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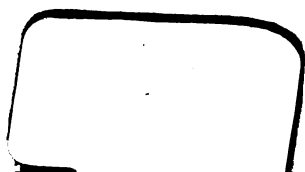
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American Law of Real Estate Agency

Including

Options, Purchases, Sales, Exchanges, Leases, Loans, Etc.

The duties and liabilities of Principals and Agents. The earning of commissions by Real Estate Brokers, and Pleading, Practice and Judicial Constructions and Interpretations

By

WILLIAM SLEE WALKER

(OF THE CINCINNATI BAR)

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PREFACE

Under our dual system, *Imperium in Imperio*, the various States, through their respective high courts of judicature, give us a richness and a variety of authoritative decisions. "I do not call one greater and one smaller. That which fills its period and place is equal to any," whether it comes from Massachusetts or Montana, from Michigan or from Mississippi.

In the preface to his *Commentary on Agency and Agents* (1876) Prof. Wharton says:

"I have thought it advisable to introduce all reported judicial decisions, no matter how cumulative, which have come to my notice in connection with the topic discussed. No doubt in this way my notes may appear overloaded and my table of cases redundant; but it must be recollected that Agency is the creature of usage as established by the courts; that usage can only be settled by cumulative rulings, and that, under our American system, there is no State whose adjudication can be safely omitted in such a commentary as the present."

It is believed, also, that a need exists for a treatise confined to one branch of the law of Agency, namely, real estate. The general treatises fail to differentiate some of its peculiar features, thereby tending to perplex or mislead the lawyer and the jurist. This is the apology, if it be needed, for adding another to the accumulated heap of works on the law.

In the preparation of this work the aim has been to present the law in the exact words of the courts, and to devote the book to setting forth their language, the utterances of the judges upon the various phases of the law of real estate agency. It is believed that in this way the lessons conveyed will be more impressive, and will afford a clearer conception of the underlying principles upon which the superstructure is reared. As a further illustration of this feature a large part of the

work is devoted to Pleading, Practice and Judicial Constructions and Interpretations. The wealth of illustrations thus presented will be especially appreciated by the younger members of the bar. It is a continuation of the study of cases, a method of education so commonly pursued in the leading law schools of the country.

Great libraries, where all the reports are accessible, are exceptional, and, in their absence, the full extracts given from the opinions of the courts will be appreciated.

I take this occasion to express my heartfelt appreciation of the kindness extended by the efficient Librarian of the Cincinnati Law Library, Edwin Gholson, Esq., and his competent and accommodating assistants.

But for the opportunity of access to the Cincinnati Law Library, with its wealth of books of the law, a work of this character would have been out of the question.

By placing the decisions under their respective subjects and by supplying suggestive headlines, it is believed that the work has been so arranged as to thoroughly illustrate every possible phase of the law of real estate agency, and to prove a mine of wealth, not only to the active practitioner, but to the layman. The latter will find in perusing its pages a history of the art of real estate agency, presenting instances of its practical application that can prove not only interesting but exceedingly instructive. He will gain a knowledge of the experiences of others which can not fail to enlarge his understanding of the subject in which he seeks to excel, as well as to gain the advantages of being able to avoid the pitfalls into which those who paid for the experience fell.

Many cases which, at first sight, may seem to be in conflict, on further reflection and careful perusal will be found to fall within some one of the general classes, the special circumstances involved clearly distinguishing them, and showing that, although apparently in conflict, in reality they are not. By supplying full references to all the cases in the country on the subject, such a comparison can be brought to bear as can not be done where but a few are given. Such a slight divergence in the circumstances often requires a qualifying of the rule, that it is dangerous to carelessly place cases in agreement,

PREFACE.

when, on careful reflection, they require, from some essential element in the case, to be clearly and properly differentiated. On that account the enunciating of hard and fast rules has been avoided. Instead of this, references are made to cases in seeming agreement and to those in seeming conflict. In this way the practitioner, guided by the facts in his case, will be best able to find and apply the law applicable to its solution; and in this way, also, the court will be able to make the facts in the case under consideration agree in its decision with some one or more of the adjudicated cases. The book is so richly filled with clear and well-expressed illustrations of the law of real estate agency, in almost every conceivable phase, that it is believed it will serve to solve almost every problem in that branch of the law that may be presented.

Where cases are decided according to the general law on the subject, as shown by the agreement of the decisions of the courts of the various States, this will be found to be the best method of dealing out, with an equal hand, justice between man and man. Nothing is calculated to produce a better impression of the impartiality with which justice is administered than the agreement brought about by the courts in the various States applying legal principles in accordance with the general consensus of opinion illustrated and applied by the unanswerable reasoning employed in well adjudicated cases.

Cincinnati, April 5, 1910.

WM. SLEE WALKER.

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AMERICAN LAW REAL ESTATE AGENCY

CHAPTER I.

SECTION.

1. Who are capable of becoming principals and agents.
2. Power of delegating authority.
3. Inherent power of becoming agents.
4. Personal acts that are undele-gatable.
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SECTION.

6. Special and general agency.
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8. Who is not a broker.
- 8a. Definition of term "Brokerage."
9. Licenses.
10. How brokers are appointed.
11. Employment of sub-agents.
12. Employment of broker, and its limitations.

Sec. 1. Who are capable of becoming principals and agents.

—In general, it may be said that every person is capable of becoming a principal or an agent. Mechem on Ag., Sec. 43.

Sec. 2. Power of delegating authority.

Principals are capable of delegating authority to others to act in their behalf and for their interests. In general, whenever a person has power to do a thing he may do it by an agent, and every person of full age, free from disabilities, has complete capacity for this purpose; but infants, in some States—to some extent—married women, idiots, lunatics, and other persons not *sui juris*, are either wholly or partially incapable of appointing agents. An infant may authorize another to do an act which is for his benefit, but he can not authorize him to do an act which is to his prejudice. Story on Agency, Sec. 6; Mechem on Agency, Secs. 18, 43, 47, 54, 56.

Sec. 3. Inherent power of becoming agents.

Almost all persons are capable of becoming agents. It is not necessary for a person to be *sui juris*, or capable of acting in his own right, in order to qualify himself to act for others. Story on Agency, Sec. 7; Mechem on Agency, Sec. 57.

Sec. 4. Certain acts are personal in their nature, and the authority confided can not be sub-delegated.

In general, what a person *sui juris* may do himself, he may delegate authority to another to do for him; yet there are exceptions; thus, although a person may do an unlawful act, it is clear that he can not delegate authority to another person to do it; for it is against the policy of the law to allow any such authority, and therefore the appointment is utterly void; it imports neither duty nor obligation, nor responsibility on either side; although it may involve both in punishment. Story on Ag. Sec. 11; Mechem on Ag. Secs. 18, 19, 20.

Sec. 5. Certain acts are personal in their nature, and cannot be sub-delegated.

For it is a personal trust or confidence, and therefore by implication prohibited from being delegated: as, if a man has a power given to him by the owner to sell an estate or to make leases for him, he can not act by an attorney or agent, for it is a personal trust. The same is true if, by will, an executor has power given to him to sell property. *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134. The same rule applies to a broker, for he can not delegate his authority to another to sign the contract on behalf of his principal, without the assent of the latter, for a personal trust and confidence is reposed in him. Story on Ag. Secs. 12 and 13; *Foss Inv. Co. v. Ater*, 49 Wash. 446, 95 P. 1017; Mechem on Ag. Sec. 19. It follows, that where the broker's power contains no power of substitution, he can not delegate his authority to another. *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213. A broker whose employment involves the exercise of discretion is without authority to sub-delegate his authority to another; however, when the act to be done is ministerial or mechanical, the agent may employ another to do it. *Ryer v. Turkel* (N. J. Err. & App.), 70 A. 68.

Sec. 6. Agency is divided into two classes—special and general.

Agency is divided into two divisions; (1) Special; (2) General Agency. A special agency particularly exists when there is a delegation of authority to do a single act. A general agency particularly exists when there is a delegation of authority to do all acts connected with a particular trade, business or employment; thus, a person authorized by his principal to execute a particular deed, or to sign a particular contract, or to procure a purchaser for certain real estate, is a special agent. Story on Ag. Sec. 17; Mechem on Ag. Sec. 6. Several instances of special agency or employments do not constitute a general agency. *Angle v. Miss. etc. R. Co.*, 9 Iowa, 487, 502. A person who is authorized by his principal to execute all deeds and sign all contracts required in a particular trade, business, or employment, is a general agent in that trade, business or employment. Story on Ag. Sec. 17; Mechem on Ag. Sec. 6.

Sec. 7. Agents employed to buy or sell real estate, to negotiate exchanges thereof, to procure leases, options and loans, are usually termed brokers.

Agents employed to buy or sell real estate, to negotiate exchanges thereof, to procure leases, options and loans, are usually termed brokers. Mechem on Ag. Sec. 934. "A broker is one who is engaged for others on a commission to negotiate contracts relative to property, with the custody of which he has no concern." *Braun v. Chicago*, 110 Ill. 186; *Kramer v. Bliss*, 88 Va. 456, 13 S. E. 914. Another definition is, "Brokers are persons whose business it is to bring buyer and seller together; they need have nothing to do with the negotiation of the bargain." *Hartley v. Anderson* (Pa. Supreme), 24 A. 675; Mechem on Ag. Sec. 13. The latter clause designates those agents known as middle-men, whose presumed aloofness from partisanship confers upon them certain privileges. See Sec. 475. A "broker" is one engaged in making contracts for others relating to property not in his custody, he acting in a sense as agent for both parties; and a salaried agent, not acting for a fee or commission, is not a broker. *Rodman v Manning* (Or. Sup. '09), 99 P. 657, 1135.

Sec. 8. Who is not a broker.

A salaried agent who does not act for a fee or rate per cent. for others is not a broker. *Portland v. O'Neill*, 1 Oregon, 218; *Rodman v. Manning* (Or. Sup. '09), 99 P. 657, 1135. A trust company, though authorized to buy and sell real estate, is not a broker. *Cr. v. Tr. Co.*, 211 Pa. 51, 60 A. 551.

Sec. 8a. Definition of term "brokerage."

Brokerage is equivalent to compensation for services rendered. *Myers v. Dean*, 11 Misc. 368, 371, 32 N. Y. S. 237; *U. S. v. Fisk*, 25 Fed. Cas. No. 15, 104.

Sec. 9. Licenses.

In some States a real estate broker, before he can lawfully engage in such business, must procure a license. *Natt v. Papet*, 15 La. 306.

Sec. 10. How brokers are appointed.

In the absence of a statute to the contrary, the employment of a broker for the purchase or sale of real estate is a contract for his services and may be by parol. *Rathburn v. McLay*, 76 Conn. 308, 56 A. 571; *Brown v. Eaton*, 21 Minn. 409, 528; *Friedman v. Shuttle*, 85 P. 726 (Ari. Sup. '06, 9 L. R. A., N. S.) 933; *Forrester-Duncan Land Co. v. Evatt* (Ark. '09), 119 S. W. 282; *Hannon v. Prentiss*, 124 Mich. 417, 83 N. W. 102; *Spengeman v. Palestine Bldg. Assn.*, 60 N. J. Law, 357, 37 A. 723; *McCurry v. Hawkins*, 83 Ark. 242, 103 S. W. 600; *Hutto v. Stough*, 157 Ala. 566, 47 S. 103; also to sign his principal's name to a contract for the sale of real estate. *Rattman v. Wasson*, 5 Kan. 552; *Pringle v. Spalding*, 53 Barb. (N. Y.) 17; *Callaghan v. Pepper*, 2 Ir. Eq. (N. C.) 399; *Coleman v. Garringue*, 18 Barb. (N. Y.) 60. In some States, the agent, for this purpose, must have written authority. *Ballou v. Bergevindsen*, 9 N. D. 285, 83 N. W. 10; *Mainwaring v. Crane*, 22 Quebec Sup. C. 67; *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. 919; *Charles v. Arthur*, 84 N. Y. S. 284; *Power v. Immigration Land Co.*, 93 Minn. 247, 101 N. W. 161

Sec. 11. Employment of sub-agents.

Ordinarily an agent is without authority to bind his principal by the employment of a broker to effect a sale. *Bennett v. Howes*,

15 Daily (N. Y.), 43, 2 N. Y. S. 717; *Jenkins v. Funk*, 33 Fed. 915; *Craver v. House* (Mo. App. '09), 120 S. W. 686. Even authority to take any steps necessary to sell the property is insufficient to authorize an agent to employ a broker to effect a sale. *Carroll v. Tucker*, 2 Misc. (N. Y.), 397, 21 N. Y. S. 952; however, a non-resident owner employing a non-resident agent to sell, impliedly authorizes the latter to employ a broker or sub-agent. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574. And whenever an agent given authority to sell land exercises his discretion as to the price, etc., he may employ a real estate broker to find a purchaser, and a sale by him will be enforced where the agent was required to obtain his commission in addition to the price fixed, although the agent may have been requested by his principal not to employ a sub-agent. *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367. If an agent employs a sub-agent for his principal and by his authority, expressed or implied, then the sub-agent is the agent of the principal, and is directly responsible to the principal for his conduct, and if damage results from the conduct of such sub-agent, the agent is only responsible in case he has not exercised due care in the selection of the sub-agent. But if the agent, having undertaken to transact the business of his principal, employs a sub-agent, on his own account, to assist him in what he has undertaken to do, he does so at his own risk and there is no privity between such agent and the principal. The sub-agent is, therefore, the agent of the agent only and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself or his servant or his agent. Mechem on Agency, Sec. 197.

Sec. 12. Employment of brokers, and its limitations.

A broker employed to sell at a certain price can not recover commissions for selling at a lower price. *Blackwell v. Adams*, 28 Mo. App. 61; *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227. A broker, in order to be assured of compensation for his services, should have a contract of employment. *Castner v. Richardson*, 18 Colo. 496, 33 P. 163; *Day v. Hale*, 50 Ill. App. 115; *Dyer v. Sutherland*, 75 Ill. 583; *Thomas v. Merrifield*, 7 Kan. App. 669, 53 P. 891; *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388; *Crosby*

v. St. Paul Lake Ice Co. 74 Minn. 82, 76 N. W. 958; *Coffin v. Linxweiler*, 34 Minn. 320; *Whiteley v. Terry*, 83 N. Y. App. Div. 197, 82 N. Y. S. 89; *McVicker v. Roche*, 74 N. Y. App. Div. 397, 77 N. Y. S. 501; *Fowler v. Hosher*, 53 N. Y. App. Div. 327, 65 N. Y. S. 638; *Whitchouse v. Drisler*, 37 N. Y. App. Div. 525, 56 N. Y. S. 95; *Von Hermann v. Wagner*, 81 Hun, 431, 30 N. Y. S. 991; *Johnson v. Whalen*, 13 Okla. 320, 74 P. (503); *Addison v. Wannamaker*, 185 Pa. St. 536, 39 A. 1111; *Copeland v. Stoneham Tannery Co.* 142 Pa. St. 446, 21 A. 825; *Harrison v. Long*, 4 Desau (S. C.), 110; *Pipkin v. Horne* (Tex. Civ. App. '02), 68 S. W. 1000; *Ehrenroth v. Putman* (Tex. Civ. App. '00), 55 S. W. 190.

In case the contract of employment fails to state the terms of sale, terms satisfactory to the principal are implied. *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Montgomery v. Knickerbocker*, 27 N. Y. App. Div. 117, 50 N. Y. S. 128. The contract of employment may be drawn so as to deprive the broker of any right to commissions if the transaction fails because of a defect in the principal's title to the real estate. *Louisville R. Co. v. Shepard*, 126 Ala. 416, 28 S. 202. If the agency is limited to the sale of certain property, the broker must show that the property sold was within the limits of the contract. *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962; *Park v. Hagle*, 124 Iowa 98, 99 N. W. 185.

Testimony of plaintiff, in an action to recover for services in purchasing an electric plant, that he went to defendant and told him that he came pursuant to a telegram from a third person; that he told defendant he had obtained papers relative to the plant and showed them to him; that defendant examined them and expressed his satisfaction with the showing, and said he wanted plaintiff to represent him in the matter, and, if the plant was purchased, wanted it taken in plaintiff's name, and that he would take care of the plaintiff in the matter, is sufficient to show an employment by defendant, and an agreement to pay the reasonable value of the services. *Hart v. Maloney*, 80 N. Y. S. 293, 80 App. Div. 265.

A company sought employment as agents for a commission to procure a purchaser; it was not recognized as such, and was informed that a part of the premises had been sold, and that an option contract had been given for the

balance; subsequently it wrote the owner that it had a party in view whom it might interest in the property, "provided we could get an option." The owner refused to give the option, and fixed the price per acre and the terms, adding, "If you can do anything for me on these terms I shall be glad to hear from you." The company wrote, "Our people will pay \$2,500 net." The owner agreed to sell, and the company, in transmitting the opinion of its attorney on the abstract, referred to unpaid taxes, the cost of the abstract, and a claim on account of a deficiency in the acreage, without any reference to the commissions. *Held*, That the company was not the owner's agent to procure a purchaser, though it expected a commission to which it was not entitled. *Steele v. Lawyer*, 47 Wash. 266, 91 P. 958.

Defendants leased mining property to plaintiff, with an option to purchase during the third year of the lease for \$20,000, and a deed conveying the property to the plaintiff was deposited with a bank, with instructions to deliver it upon receipt of the sum of \$2,500 less than that stated in the option. *Held*, That there was nothing in the lease or instructions to show that plaintiff was an agent to sell the property on commission. *Pollard v. Sayre*, (Colo. Sup. '08), 98 P. 816. In an action by a real estate broker to recover commissions for procuring a purchaser for defendant's property, a letter from the broker stating that if the owner of the land makes an exchange, the broker expects him to pay a commission, and asking him if he would do so, and the answer from the owner that in case of a sale he would be willing to pay a commission, was sufficient to show an implied promise on the part of the owner to pay what plaintiff's services were reasonably worth on a subsequent exchange brought about by the services of the plaintiff. *Annabell v. Traverse Land Co.* (Minn. Sup. '09), 121 N. W. 233.

CHAPTER II.

SECTION.

13. Exclusive employment as broker or agent.
14. Duration of the agency.
15. Termination of the agency.
16. A contract coupled with an interest.

SECTION.

17. Special contracts for sale of real estate.
18. Authority conferred on brokers and agents.

Sec. 13. Exclusive employment as broker or agent.

An exclusive agency, supported by a sufficient consideration, entitles a broker to commissions on a sale made by the principal (if excluded) or through the efforts of another broker during the time specified. *Gregory v. Bonney*, 135 Cal. 589, 67 P. 1038; *Crane v. McCormick*, 92 Cal. 176, 28 P. 222; *Long v. Herr*, 10 Colo. 380, 15 P. 802; *Metcalf v. Kent*, 104 Iowa, 487, 73 N. W. 1037; *Lipscomb v. Cole*, 81 Mo. App. 53; *Levy v. Rothe*, 17 Misc. 402, 39 N. Y. S. 1057; *Schultz v. Griffin*, 5 Misc. 499, 26 N. Y. S. 713; *Emberson v. Dean*, 46 How. Pr. (N. Y.) 236; *Powell v. Anderson*, 15 Daly, 219, 4 N. Y. S. 706; *Owens v. Wehrle*, 14 Pa. Super. Ct. 536; *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Carle v. Parent* (Montreal L. R.), 5 Q. B. 451; *Moses v. Bierland*, 31 N. Y. 462.

Where a broker is given the exclusive agency, but not inhibiting the principal from selling, the contract is not violated by a sale by the principal to one not a customer of the broker. *English v. Wm. George Butt. Co.* (Tex. Civ. App. '08) 117 S. W. 996; *Waterman v. Boltinghouse*, 82 Cal. 659, 23 P. 195; *Ingold v. Symonds*, 125 Iowa, 82, 99 N. W. 713; *Johnson v. Buchanan* (Tex. Civ. App. '09), 116 S. W. 875; *Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 415; *Golden Gate Packing Co. v. Mine*, 55 Cal. 606. A contract of agency will not be construed to be exclusive, unless

established expressly or by clear implication. *Crook v. Forst*, 116 Ala. 395, 22 S. 540; *White v. Benton*, 121 Iowa, 354, 96 N. W. 876; *Kidman v. Howard*, 18 S. Dak. 161, 99 N. W. 1104.

It was agreed between the owner of land and a broker, that the broker should have the "exclusive agency" for the sale of the land for a fixed period at a fixed price, and that the broker should give attention to the sale, of the land, have the same examined and advertised, and should report promptly all sales, etc. The land aggregated over 51,000 acres, and the timber thereon was the most valuable part. *Held*, That the words "exclusive agency" deprived the owner of the right to sell the premises, and a sale by him of the timber before the expiration of the fixed period was a breach of the contract. *Hunter v. Wenatchee Land Co.* 97 P. 494, 50 Wash. 438. (This is contrary to the general doctrine which requires the exclusive right to the agent to deprive the owner of the right to sell.)

A company was employed to sell defendant's property under a contract giving it the sole agency for the sale of the property for three months from the date of the contract, and thereafter until notified by defendant in writing of the withdrawal of the property from sale, and defendant further agreed to pay the company the agreed commission if the property was sold during the term of the contract, whether sold by the company or by some one else. *Held*, That the company would be entitled to the specified commission on the sale taking place within three months, regardless of any attempted revocation by the principal. *Novakovich v. Union Trust Co.* (89 Ark. 412), 117 S. W. 246.

A broker is not entitled to commission on a sale by a principal, notwithstanding he is given the exclusive right to sell, unless it is also agreed that he shall receive a commission whether the sale be effected by him, by the principal, or some third person. *Turner v. Baker*, 225 Pa. 359, 74 A. 172. (Unless the principal agrees to pay commissions in case of sale by him or another broker, the broker prejudiced has a right of action for breach of the contract.) An owner of property contracted with a broker to make a sale of property, and that in case of a sale thereof, within one year, he would pay a commission. *Held*, That the sale referred to was one consummated by the broker or brought about

by him, he having found a purchaser and brought the owner and purchaser together, and did not give the broker the exclusive right of sale to the exclusion of the owner himself, and he was not entitled to a commission upon a sale made by the owner. *Parkhurst v. Tyron*, 119 N. Y. S. 184.

Sec. 14. Duration of the agency.

An agency to sell real estate is presumed to continue until a sale is effected, and the burden is on the principal to rebut such presumption. *Hartford v. McGillicuddy*, 103 Me. 224, 68 A. 860. A contract of agency ordinarily ceases on the delivery of the title papers and the payment for the property. *Walker v. Derby*, 5 Biss. (U. S.) 134; *Campbell v. Chase* (Kan. Sup. '08), 96 P. 949; *Bd. Trus. Oberlin Coll. v. Blair*, 45 W. Va. 812, 32 S. E. 203. The vendor sometimes limits the time within which to sell, to 30 or 60 days. *Beadle v. Sage Ld. & Imp. Co.* 140 Mich. 199, 103 N. W. 554; *Satterthwaite v. Goodyear*, 137 N. C. 302, 49 S. E. 205. A principal is not liable for commissions if the sale is not made until after the time fixed has expired. *Hurst v. Williams*, 31 Ky. Law Rep. 658, 102 S. W. 1176; *Dekker v. Klingman*, 149 Mich. 96, 112 N. W. 727, 14 D. L. N. 341; *Horton v. Inman*, 145 Mich. 438; 108 N. W. 746; *Loxley v. Studebaker*, 68 A. 98, 75 N. J. L. 599; *Ewing v. Lunn* (S. Dak. Sup. '08), 115 N. W. 527. However, where the owner waives performance within the time and accepts a purchaser furnished after, he will be liable to the broker for commissions. *Ice v. Maxwell*, 55 S. E. 899, 61 W. Va. 9. A broker was held entitled to compensation, who found a purchaser near the end of the contract who desired time to examine the title. *Watson v. Brooks*, 13 Fed. 540, 8 Sawyer Cir. Ct. 316.

That the broker had not a continuing agency from Y. for the sale of the property until the time of its sale to A., is shown by the fact that when A. asked him if he still had the property for sale, he did not assert a continuing agency, but said that he would see, and then went to Y. to see if he could still be allowed to make the sale, and was informed by Y. that he could not do so, as another had taken up the matter. *Kiefer v. Yoder*, 198 Pa. St. 308, 47 A. 974.

Sec. 15. Termination of the agency.

Ordinarily, unless a contract of employment is coupled with an interest or is given for a valuable consideration, the authority of the agent may be terminated at will by giving notice, subject only to the requirement that it be given in good faith, and before the broker finds a purchaser. *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1178; *Blumenthal v. Goodale*, 89 Cal. 251, 26 P. 906; *Brown v. Pfau*, 38 Cal. 550; *Freeland v. Hughes*, 109 Ill. App. 73; *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139; *Schuster v. Martin*, 45 Ill. App. 481; *Gleason v. McKay*, 37 Ill. App. 464; *Bush v. Hill*, 62 Ill. 216; *Wilson v. Dyer*, 12 Ind. App. 320, 39 N. E. 163; *Kavanaugh v. Ballard*, 21 Ky. L. R. 1683, 56 S. W. 159; *Taylor v. Martin*, 109 La. 137, 33 S. 112; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982, 179 Mass. 474, 61 N. E. 37, 55 N. E. 77; *West v. Demme*, 128 Mich. 11, 88 N. W. 95; *Heaton v. Edwards*, 90 Mich. 500, 51 N. W. 544; *Reishus-Remer Ld. Co. v. Benner*, 91 Minn. 401, 98 N. W. 186; *Jayne v. Drake* (Miss. Sup. '06), 41 S. 372; *Kolb v. Bennett Land Co.* 74 Miss. 567; *Jones v. Berry*, 37 Mo. App. 125; *Kesterson v. Chauvrant* (Mo. App. '02), 70 S. W. 1091; *Green v. Wright*, 36 Mo. App. 298; *Huffner v. Ellis*, 64 Neb. 623, 90 N. W. 552; *Slater v. Holt*, 10 N. Y. State, 257; *Cardy v. Ruth*, 100 N. Y. S. 1043, 115 App. Div. 568, 103 N. Y. S. 1121; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119; *Raleigh R. E. & T. Co. v. Adams*, 58 S. E. 1008, 145 N. C. 161; *Vincent v. Woodland Oil Co.* 165 Pa. St. 402, 30 A. 991; *Evans v. Gay*, 38 Tex. Civ. App. 442, 74 S. W. 575; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892; *Knox v. Parker*, 2 Wash. 34, 25 P. 909. A power confided to two or more special agents terminates on the death of one. *Mechem on Ag. Sec. 250*; but the authority is not revoked by a letter which was not received by the broker. *Sayre v. Wilson*, 86 Ala. 151, 5 S. 157. A contract of agency may be terminated by the death of the principal. *Crowe v. Trickey*, 204 U. S. 228, affirming 71 P. (Ariz.) 965; *Crowe v. Harmon*, 204 U. S. 241, affirming 71 P. (Ariz.) 1125; *Kyle v. Gaff*, 105 Mo. App. 672, 78 S. W. 1047; *Shistler's Est.* 2 Pa. Dist. 588; *Mechem on Ag. Sec. 240*; or by the partial destruction of the subject-matter; *e. g.* the dwelling; *Cox v. Bowling*, 54 Mo. App. 239. Where a time limit has been given, the principal can not but in good faith revoke before it

expires. *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906; *Glover v. Henderson*, 170 Mo. 367, 25 S. W. 175; *Stamets v. Dennison*, 193 Pa. St. 548, 44 A. 575; *Norton v. Sjolseth*, 43 Wash. 327, 86 P. 573. Where the contract is limited to a definite period, it ends at that time. *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642; *La Force v. Washington Uni.* 106 Mo. App. 517, 81 S. W. 209. The owner is under no obligation to extend the time in favor of a prospective purchaser found by the broker; time is of the essence of such a contract. *Castner v. Richardson*, 18 Colo. 496, 33 P. 163; *Watson v. Brook*, 11 Oregon, 271, 3 Pac. 679.

An agency may be revoked by a sale by the owner without notice to the agent; after the sale there is nothing to support the agency, and revocation will be presumed. *Mechem on Ag.* 220; *White v. Hoskins*, 121 Iowa, 354, 96 N. W. 876; *Helling v. Darby*, 71 Kan. 107, 79 P. 1073; *Baars v. Hyland*, 65 Minn. 150, 67 N. W. 1148; *Hodge v. Appelles*, 107 N. Y. S. 170, 122 App. Div. 437; *Ettinghoff v. Harwitz*, 100 N. Y. S. 1002, 115 App. Div. 571; *McDonald v. Cabiness*, 100 Tex. 615, 102 S. W. 721; *Hatch v. Coddington*, 95 W. S. 56. See also Sec. 643. *Contra*, *Reams v. Wilson*, 147 N. C. 304, 60 S. E. 1124; also, Sec. 587. The agency may be revoked by the exercise of an option to purchase. *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. R. R. 243, 80 S. W. 1171. Notice to the agent terminating the agency takes effect from the date of the delivery or receipt thereof by the agent. *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94; *Robertson v. Cloud*, 47 Miss. 208. Violation of instructions warranted a principal in terminating the agency. *Macferran v. Gallinger*, 210 Pa. St. 74, 59 A. 435. Where a principal wrote his agent not to sell property but his residence, authority to sell the former was revoked. *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119. The fraud of a broker in making misrepresentations in negotiating an exchange of lands warranted his discharge. *Featherstone v. Trone*, 82 Ark. 381, 102 S. W. 196. A contract of agency determines on the fraud of the agent. *Patton v. Cook*, 48 N. W. 994, 83 Iowa, 71. An agency for ten days or until withdrawn in writing, is not terminated at the end of an extension granted. *Clark v. Dalziel*, 3 Cal. App. 121, 84 P. 429. Where several brokers have the same property for sale, a sale by one, to the knowledge of the others,

puts an end to the contract with the others. *Cashman v. Glover*, 11 Ill. 600. Or without notice, *infra*. There are authorities holding that where the broker has incurred expenses, and has expended time and money in endeavoring to sell, the principal will not be allowed to terminate the agency. *McCray & Son v. Pfof*, 118 Mo. App. 672, 94 S. W. 998; and on doing so the agent may recover damages. *Green v. Cole*, 103 Mo. 70, 15 S. W. 317; *Durkee v. Gunn*, 41 Kan. 496, 21 Pac. 637; *Bathrik v. Coffin*, 13 N. Y. App. Div. 101, 43 N. Y. S. 313; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Tappin v. Henley*, 11 Weekly Rep. (Eng.) 466. A contract terminated by a sale by the owner to one with whom the agent had begun negotiations does not defeat the broker's right to commissions. *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923. *Contra*, *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65. Under a contract to continue until withdrawn in writing, a deed by the owner to a purchaser was held not equivalent to a withdrawal. *Kimmel v. Skelly*, 130 Cal. 555, 62 Pac. 1067. This conflicts with the well established rule that a sale puts an end to the agent's employment.

Where a purchaser failed to make payment, and the owner declared the contract at an end, he was held liable to the broker for his commission. *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174. An agency once terminated is not revived by subsequent acts. *Moore v. Stone*, 40 Iowa, 259. A revocation may be effected by notification to the agent in writing or by parol, even where power was given by deed, or be implied from circumstances. *Brookshire v. Brookshire*, 8 Ired. (N. C.) 74. Where an agent has special authority to do only a particular act no notice of revocation to third parties is necessary. 1 Parsons on Con. 71. The revocation of a contract with a broker, after he procures a purchaser, does not operate to deprive the broker of commissions. *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1178; *Bush v. Hill*, 62 Ill. 216; *Provident T. Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030; *Gillett v. Corum*, 7 Kan. 156; *Shepard v. Hedden*, 29 N. J. L. 334; *Reams v. Wilson*, 147 N. C. 304, 60 S. E. 1124. The revocation of a contract to sell follows a sale by the owner and no notice to the agent is necessary. *Wallace v. Figone*, 107 Mo. App. 362, 81 S. W. 492. Compare, *Reams v. Wilson*, 147 N. C. 304, 60 S. E. 1124. Where a broker has a

certain time within which to effect a sale, the principal can not defeat his right to compensation by revoking the agency before the expiration of the time specified. *Harrison v. Angerson*, 115 Ill. App. 226; *Stamets v. Dennison*, 193 Pa. St. 548, 44 A. 575. Compare Sec. 22. Where a purchaser is unable to carry out his contract, the contract with the broker is cancelled. *Riggs v. Turnbull*, 105 Md. 135, 66 A. 13, 8 L. R. A. (N. S.) 824. Authority conferred on a partnership to sell real estate is terminated on the dissolution of the partnership. *Larson v. Newman* (N. D. Sup. '09), 121 N. W. 202. The owner of a lot, who had placed it in a broker's hands for sale wrote him that she felt at liberty to withdraw "from the proposition under consideration," if she chose. The broker replied that upon receipt of her letter he had seen his client, but could not make the deal, and that it looked like the matter was closed, unless she would accept a lower offer. *Held*, That the broker's letter terminated the agency at the time of mailing, and he was not entitled to commissions on a sale of the lot negotiated by him next day. *Jackson v. Parrish*, 157 Ala. 584, 47 S. 1014; *Haygood v. Parrish*, 157 Ala. 584, 47 S. 1015.

Under the stipulations of a contract listing a farm with the broker for sale, that if the farm should be sold by the owner, after withdrawal from the broker, to a customer to whom the broker had recommended it, or who had learned that it was for sale, directly or indirectly, from the broker, the owner would pay a designated commission, the owner is liable for the commission on a sale to a customer to whom the broker recommended the farm, whether such sale was effected, in whole or in part, by reason of such recommendation or not. *Strout v. Hubbard* (Me. Sup. '08), 71 A. 1020.

Where an owner employing a broker to procure a purchaser of property terminated the authority of the broker, after receiving an offer from the person with whom the broker was negotiating, and subsequently dealt directly with such person, and made a sale for a price over twice as much as the offer to the broker, the broker was not entitled to commissions, for his authority had been terminated in good faith, and not to avoid the payment of commissions. *Gardner v. Pierce*, 116 N. Y. S. 155. Compare Sec. 687a.

Where the sub-agent derives his authority solely from the agent no notice is required to be given by the principal to the sub-agent of the revocation of the agent's authority; but where the sub-agent was appointed by and with the authority of the principal, he is the agent of the principal, and notice should be given to him of the revocation of his authority. *Mechem on Ag.*, sec. 227.

Sec. 16. A contract coupled with an interest.

An interest in the land itself, as distinguished from the proceeds of it, is the distinguishing feature of a power coupled with an interest. *Hunt v. Ronsmanier*, 8 Wheat. (U. S.) 174. A contract was held to be coupled with an interest where a broker was employed to sell land procured in an exchange, the services rendered by him in effecting the trade being in part the consideration for the second employment, and such employment could not be revoked at the mere pleasure of the principal. *Bird v. Phillips*, 115 Iowa, 703, 87 N. W. 414. An agent to receive half the profits for selling land is given an interest only in the profits of the land sold, not in that unsold. *Bickford v. Searles*, 41 N. Y. S. 148, 9 App. Div. 158, 75 N. Y. St. 606. Authority to retain commissions from the purchase money is not a power coupled with an interest. *Hall v. Gambrill*, 92 Fed. 32, 34 C. C. A. 190. One authorized to lay off land into lots and sell, the proceeds above a certain amount to be divided with the owner, has not a power coupled with an interest. *Lemoyne v. Quimby*, 70 Ill. 399; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317. It therefore follows that mere commissions to be earned by the agent in selling property do not constitute an agency coupled with an interest. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Lindheim v. Cen. Nat. Realty, etc., Co.*, 97 N. Y. S. 619, 111 App. Div. 275.

Sec. 17. Special contracts with brokers for the sale of real estate.

To entitle a broker to commissions or compensation a contract, express or implied, is necessary. *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163; *Day v. Hale*, 50 Ill. App. 115; *Stephen v. Scott*, 43 Kan. 285, 23 P. 555; *Thomas v. Merrifield*,

7 Kan. App. 669, 53 Pac. 391; *Holden v. Stark*, 159 Mass. 503, 34 N. E. 1069; *Brooks v. Leathers*, 112 Mich. 463, 70 N. W. 1099; *Nolan v. Swift*, 111 Mich. 56, 69 N. W. 96; *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388; *Steidl v. McClymonds*, 90 Minn. 205, 95 N. W. 906; *Crosby v. St. Paul Lake Ice Co.*, 74 Minn. 82, 76 N. W. 958; *Coffin v. Linxweiler*, 34 Minn. 320; *Kinder v. Pope*, 106 Mo. App. 506, 80 S. W. 315; *Whiteley v. Terry*, 82 N. Y. S. 89, 83 App. Div. 197; *McVicker v. Roche*, 77 N. Y. S. 501, 74 App. Div. 397; *Fowler v. Hosche*, 65 N. Y. S. 638, 53 App. Div. 327; *Whitehouse v. Drisler*, 56 N. Y. S. 95, 37 App. Div. 525; *Von Herrmann v. Wagner*, 30 N. Y. S. 991, 81 Hun. 431; *Johnson v. Whalen*, 13 Okla. 320, 74 P. 503; *Addison v. Wannanaker*, 185 Pa. St. 536, 39 A. 1111; *Copeland v. Stoneham Tan. Co.*, 142 Pa. St. 446, 21 A. 825; *Pipkin v. Horne* (Tex. Civ. App. '02), 68 S. W. 1000; *Ehrenroth v. Putman* (Tex. Civ. App. '00), 55 S. W. 190; *Clammer v. Eddy*, 41 Colo. 235; 92 P. 722.

Mere consent by the owner to the rendition of the services is insufficient, even where they result in a sale or exchange of the property, where the services were unsolicited. *Merrill v. Lathan*, 8 Colo. App. 263, 45 P. 524; *Atwater v. Lockwood*, 39 Conn. 45; *Phelps v. Hale*, 43 Colo. 255; 95 P. 925; *Viley v. Pettit*, 96 Ky. 576, 16 Ky. L. R. 650, 286, 29 S. W. 438; *Wilson v. Clark*, 54 Minn. 341, 56 N. W. 40; *Pierce v. Thomas*, 4 E. D. Smith (N. Y.), 354; *Haase v. Schneider*, 98 N. Y. S. 587, 112 App. Div. 336; *Goodspeed v. Robinson*, 1 Hilt. (N. Y.) 423. *Contra*, *Kinder v. Pope*, 106 Mo. App. 536, 80 S. W. 315.

A person acting as a broker in the sale of real estate, but not employed as such, will not be entitled to recover brokerage, unless it should appear that the seller knew, before the sale was consummated, that the plaintiff acted as a broker. *Tinkham v. Knox*, 18 N. Y. S. 433, aff'd 2 Miss. Rep. 579, 21 N. Y. S. 954; *Pallentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037.

Where a broker asks and obtains the price of land from the owner, this, without more, does not establish an employment of agency. *Stephen v. Bailey*, 149 Ala. 256, 42 S. 740; *Castner v. Richardson*, 18 Colo. 496, 33 P. 163; *Denton v. Abrams*, 105 N. Y. S. 2, 120 App. Div. 593; *White v. Templeton*, 79 Tex.

454, 15 S. W. 483; *Dunn v. Price*, 87 Tex. 318, 28 S. W. 681; *Meston v. Davies* (Tex. Civ. App. 96), 36 S. W. 805; *Phelps v. Hale*, 43 Colo. 255, 95 P. 925.

Merely introducing a purchaser to the owner is insufficient to create a contract of employment, unless his character as agent was, at the time, disclosed to the owner. *Keener v. Harrod*, 2 Md. 63. Contracts with brokers for the sale of realty are presumptively entered into in good faith, and courts should protect the interests according to the true meaning of the contracts. *Carder v. O'Neill*, 176 Mo. 401, 75 S. W. 764. A contract to sell real estate may be created by a letter to the broker. *Dekremen v. Clothier*, 96 N. Y. S. 525, 109 App. Div. 481; *Jasper v. Wilson* (N. M. Sup. '08), 94 P. 951; *Obenauer v. Solomon*, 151 Mich. 570, 115 N. W. 696. To create such a contract the letter must be specific and certain. *Fay v. Sullers*, 15 Okla. 171, 81 P. 426. Where an owner said he would allow certain commissions to a broker if he procured a purchaser to whom the owner would be willing to sell, a contract was established. *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509. Unless a different intention clearly appears, authority to sell will be limited to authority to find a purchaser. *Brown v. Gilpin*, 75 Kan. 773, 90 P. 267; *Ross v. Craven* (Neb. Sup. '09), 121 N. W. 451.

A contract with a broker for six months to sell realty providing that, "at such time as a sale shall be effected," a commission shall be paid, does not entitle the broker to a commission on a sale by the owner, unassisted by the broker, within the time named. *Davis v. Van Tassel*, 107 N. Y. S. 910. Employing a broker to procure a purchaser for real estate, payment of commissions to be made, "as soon as a deal is made for making such contract or deal," citing owner to a prospective buyer, or being instrumental in any manner whatever, provided for a commission on making a sale or producing a purchaser. *McDermott v. Mahoney*, 115 N. W. 32, 106 N. W. 925, 139 Iowa, 292, affirmed. Finding a customer, with whom the principal concludes a contract of purchase, does not give any right to commissions, unless the broker was the procuring cause of the transaction. *Quimby v. Tedford*, 4 Colo. App. 210, 35 P. 276; *Anderson v. Smythe*, 1 Colo. App. 253, 28 P. 478; *Babcock v.*

Merritt, 1 Colo. App. 84, 27 P. 882; *Neufeld v. Oren*, 60 Ill. App. 350; *Watta v. Howard*, 51 Ill. App. 243; *Clark v. Nessler*, 50 Ill. App. 550; *Collier v. Johnson*, 23 Ky. L. R. 2453, 67 S. W. 830; *Taylor v. Martin*, 109 La. 137, 33 S. 112; *Studer v. Byson*, 92 Minn. 388, 100 N. W. 90; *Francis v. Eddy*, 49 Minn. 447, 52 N. W. 42; *Cathcart v. Bacon*, 47 Minn. 34, 49 N. W. 331; *Putnam v. Howe*, 39 Minn. 363, 40 N. W. 258; *Armstrong v. Wahn*, 29 Minn. 126, 12 N. W. 345; *McCrary v. Kellogg*, 106 Mo. App. 597, 81 S. W. 465; *Crowley v. Somerville*, 70 Mo. App. 376; *Ramsey v. West*, 31 Mo. App. 676; *Frenzer v. Lee* (Neb. Sup. '02), 90 N. W. 914; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 415; *Phinney v. Chesebro*, 87 N. Y. App. Div. 409, 84 N. Y. S. 449; *Johnson v. Lord*, 54 N. Y. S. 922, 35 App. Div. 325; *Ware v. Dos Passos*, 4 N. Y. App. Div. 32, 38 N. Y. S. 673; *Woolley v. Buhler*, 73 Hun, 158, 25 N. Y. S. 1045; *South v. Seattle, etc., R. Co.*, 72 Hun, 202, 25 N. Y. S. 368; *Hay v. Platt*, 66 Hun, 488, 21 N. Y. S. 362; *White v. Twitchings*, 26 Hun, 503; *Mara-cella v. Odell*, 3 Daly (N. Y.), 123; *Harris v. Boertnell*, 2 Daly (N. Y.), 189; *Woods v. Barton*, 47 N. Y. S. 184, 21 Misc. 326; *Randruff v. Schroeder*, 46 N. Y. S. 943, 21 Misc. 52; *Burke v. Pfeffer*, 68 N. Y. S. 799, 34 Misc. 774; *Brown v. Shelton* (Tex. Civ. App. '93), 23 S. W. 483. See also Sec. 446.

A letter written to a broker advising him that if he could purchase certain described real estate the signer thought he would be ready to purchase the same on the succeeding Monday at a specified price was not a sufficient note or memorandum of a contract to employ a broker to purchase the property required by Civil Code, section 1624. *Logan v. McMullen*, 4 Cal. App. 154, 87 P. 285.

A broker mailed to his client a blank contract of employment for his signature, containing the price, terms of sale, and a stipulation for five per cent. commissions. The owner did not sign the contract, but wrote that the broker might sell to any person not an Armenian. *Held*, that the owner's reply was an express acceptance of each of the terms of the contract submitted, including the rate of commission. *Baird v. Loescher*, 98 P. 49 (Cal. App. '08).

Defendant having, before acceptance, withdrawn his offer for the purchase of land carried by plaintiff on his books for sale

for the owner, no promise or word with reference to the payment of commissions by defendant being shown, is not liable for commissions. *Donnelly v. Chetejian*, 115 N. Y. S. 125.

Sec. 18. Authority conferred on real estate brokers and agents.

One buying from a non-resident owner, through a real estate broker, is bound to ascertain his authority and the correspondence by which it is established. *Merritt v. Wasenich*, 49 Fed. 785; *Sullivant v. Jähren*, 71 Kan. 127, 79 P. 1071; *Mechem on Ag.*, secs. 276, 288, 290. Authority to negotiate a sale to one person, on particular terms, is insufficient to authorize a subsequent sale to a different person. *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; compare *Smith v. Mayfield*, 60 Ill. App. 266. A letter from a principal is sufficient authority for the agent to sell according to its terms. *Stadelman v. Fitzgerald*, 14 Neb. 290; *Montgomery v. Amster* (T. C. A. '09), 122 S. W. 307; *West v. Mills*, 82 N. Y. S. 473, 83 App. Div. 629; *Johnson v. Huber* (Kan. Sup. '09), 103 P. 99. Authority to sell for cash and time does not warrant a sale for more cash and less time. *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891; *Taylor v. Read* (Tex. C. A. '08), 113 S. W. 191. Authority to sell for half cash is complied with by a sale for cash on delivery of the deed. *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215. Without special authority an agent to collect rents can not pay a debt of his principal. *Phillips v. Belden*, 2 Edw. (N. Y.) Ch. 1. Authority to locate and survey land confers no authority to sell. *Moore v. Lockett*, 2 Bibb. (Ky.) 67. Authority to sell and convey lands for cash, includes authority in the agent to receive payment of the purchase money. *Yerby v. Grigsby*, 9 Leigh. (Va.) 387. Compare *Halsell v. Renfrew*, 14 Okl. 674, 78 Pac. 118, affirmed 202 U. S. 287. Authority to make contracts for the sale of lands authorized the agent to receive so much money as is paid in hand on the sale, as an incident to the power of sale. *Yerby v. Grigsby*, 9 Leigh (Va.), 387.

An agent to sell lands on credit has no authority to receive payment, nor before due, nor in anything but money. *Mann v. Robinson*, 19 W. Va. 49. An agent has no authority to give an extension of time to the purchaser to make a payment.

Gerrish v. Maher, 70 Ill. 470. Authority to employ lawyers to secure the right and title of the principal to certain land, does not authorize a conveyance of half of the land to them for their services and for their agreeing to provide for the expenses of a suit to confirm the title, and, in case of success, to pay to them a certain sum in addition. *Blum v. Robertson*, 24 Cal. 128. An agent appointed to rent and care for real estate has no authority, in his own name, to recover possession from the holder of a tax title. *McHenry v. Painter*, 58 Iowa, 365. An agent authorized to enter into a written contract for the sale of real estate can not enter into a verbal agreement therefor. *Barmig v. Peirce*, 5 Watts & S. (Pa.) 548. To sell in lots does not authorize a sale otherwise, and, if made, the same will be set aside. *Rice v. Tavenier*, 8 Minn. 248.

The receipt of an agent, authorized to sell and convey land, who enters into a contract for his principal with a purchaser, binds his principal. *Peck v. Harriott*, 6 Serg. & R. (Pa.) 146. Authority of an agent to sell a lot for \$5,500 net, does not support a sale for \$5,500 gross, made nine months after when the property has greatly advanced in value. *Wassweyler v. Martin*, 78 Wis. 59, 46 N. W. 890; *Colvin v. Blanchard*, 106 S. W. (Tex. Civ. App. '07) 323; *Schmidt v. Chittenden*, 98 P. 48 (Cal. App. '08). A letter from a principal to his agent stating, "I am glad you have sold the 88 acres; now, sell the 40," is not, under the Missouri statute, an authorization in writing for the sale of the additional forty acres. *Johnson v. Fecht*, 185 Mo. 335, 83 S. W. 1077. And a letter by a principal to his agent stating, "I am just in receipt of your favor of the 5th inst. regarding sale of the 40-acre tract of land, and in reply would say as follows: Have deed made out and sent to me for signing, as I can not say definitely when I will be able to return," etc., the letter of the agent replied to, without disclosing the name of the proposed vendee, stated that the agent had sold the forty acres on the south side of the railroad for \$1,000, and that "this completes the sale of the whole tract for \$4,000," and concluded by asking whether they should send the deed to be executed, or whether he would soon be home. *Held*, That the principal's letter was insufficient to constitute a

written ratification of the sale. *Johnson v. Fecht*, 185 Mo. 335, 83 S. W. 1077.

A contract of sale executed by a broker under stale authority will not be specifically enforced. *Hall v. Gambrill*, 92 Fed. 32, 34 C. C. A. 190. An agreement by a broker to give a purchaser possession in ninety days was beyond the scope of his authority. *Hopkins v. Everly*, 150 Pa. St. 117, 24 A. 624, 30 Weekly Notes Cas. 393. Power to sell any or all of constituent's real estate, authorizes the sale of that acquired subsequently. *Fay v. Winchester*, 4 Metc. (Mass.) 513; *Burkey v. Judd*, 22 Minn. 287. Power to sell all land the principal has not conveyed, authorizes the sale of that sold but not conveyed. *Mitchell v. Maupin*, 3 T. B. Mon. (Ky.) 185. In Illinois a power, not under seal, will authorize the attorney to sell but not to convey the land. *Watson v. Sherman*, 84 Ill. 263, 267. A broker authorized to sell, partly for cash and partly on time, has discretion to determine the amount of the cash payment. *Taylor v. Cox* (Tex. Supreme '87), 7 S. W. 69. If an agent be authorized in fact, though inoperative in law to bind his principal, no recovery can be had against the agent. *Thomson v. Davenport*, 2 Smith's L. C. 366; *Walker v. Bk. of St. N. Y.*, 9 N. Y. 582; *Sheffield v. Ladue*, 16 Minn. 388; *Duncan v. Niles*, 32 Ill. 532; *Scery v. Socks*, 29 Ill. 313; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Leronx v. Brown*, 12 C. B. (Eng.) 801; *Aspinwall v. Torrence*, 1 Lans. (N. Y.) 381; *Smont v. Illory*, 10 M. & W. (Eng.) 1. The mere insertion in an instrument, without consideration, that it is irrevocable, is inoperative. *Walker v. Denison*, 86 Ill. 162. Authority, in writing, left with an agent after revocation may, by its exercise, bind the principal as to third persons without notice. *Beard v. Kirk*, 11 N. H. 397.

A sale by a broker at \$1,500, one month after he said he could not sell at that price and asked for lower terms, was without authority. *Matthews v. Soule*, 12 Neb. 398. Abbreviations used in the authority to an agent, easily understood by those familiar with land titles, did not make the authority void for uncertainty. *Meline v. Ruffino*, 129 Cal. 514, 62 P. 93. A letter to an agent to sell real estate, the buyer to pay the commissions, is sufficient authority to sell on the terms stated.

Weaver v. Snively, 73 Neb. 35, 102 N. W. 77. Proof of authority to make a loan does not give authority to collect the principal or interest. *Ortmeier v. Ivory*, 208 Ill. 577, 70 N. E. 665. Ordinarily the authority of an agent terminates on the death of the principal. *Kyle v. Gaff*, 105 Mo. App. 672, 78 S. W. 1047. A real estate agent is bound by the precise terms of his contract, and the principal is not bound by departures therefrom. *Balkene v. Searle*, 116 Iowa, 374, 89 N. W. 1087; *Campbell v. Chase* (Kan. Sup. '08), 96 P. 949; *In re Fairmount Cab Co.* (Com. Pl.), 9 Pa. Co. Ct. R. 201; *Hagler v. Ferguson* (Tex. Civ. App. '08), 111 S. W. 673; *Jones v. Halleday*, 2 App. Cas. (D. C.) 279. A contract, in writing, was held to be insufficient in failing to state the amount of the commissions to be paid to the broker. *Zimmerman v. Zahender*, 164 Ind. 466, 73 N. E. 920; *Footte v. Robbins*, 50 Wash. 277, 97 P. 103.

In New York a contract to sell real estate signed by a son, by direction of the father, was held insufficient to confer authority upon the broker. *Cohen v. Boccuzzio*, 86 N. Y. S. 187, 42 Misc. 544. Compare Sec. 74. A contract of sale made by an agent in excess of his authority is not binding on his principal. *Strong v. Ross*, 33 Ind. App. 586, 71 N. E. 918; *Staten v. Hammer*, 121 Iowa, 499, 96 N. W. 964; *Fleming v. Burke*, 122 Iowa, 433, 98 N. W. 288; *Hagler v. Ferguson* (Tex. Civ. App. '08), 111 S. W. 673.

A broker has no implied authority to bind the principal by signing a contract of sale, nor to fix the terms, nor materially to change the terms without the principal's consent. *Sullivant v. Jahren*, 71 Kan. 127, 79 P. 1071; *Larson v. O'Hara*, 107 N. W. 821, 98 Minn. 71; *Hardizer v. Columbia*, 50 Wash. 405, 97 P. 790; *Hutchins v. Westheimer*, 51 Wash. 539, 99 P. 577. An agent in whose hands lands are placed for sale, is not thereby authorized to sign a contract of sale. *Jones v. Howard*, 234 Ill. 404, 84 N. E. 1041; *Rowland v. Hall*, 106 N. Y. S. 55, 121 App. Div. 459; *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 A. 1073; *Stengel v. Sergeant* (N. J. Eq.), '08, 68 A. 1106; *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. R. 137; *Gault Lumber Co. v. Pyles* (Okla. Supreme '07), 92 P. 175; *Colvin v. Blanchard* (Texas Supreme '07), 106 S. W. 323; *Watson v. Milliken*, 27 App. (D. C.) 500; *Syllisin v. Hanson*, 48 Wash. 608, 94 P. 187; *Flyal*

v. Dowling (Or. Sup. '09), 102 P. 178; *Light v. Daggett* (S. D. Sup. '09), 121 N. W. 862; *Lawson v. King* (Wash. Sup. '09), 104 P. 1118.

A broker to sell lands has no authority to collect or to receive the purchase price; and a purchaser who pays him, without asking for his written authority, does so at his risk. *Halsell v. Renfrow*, 14 Okla. 674, 78 P. 118, aff'd 202 U. S. 287. Compare *Yerby v. Grigsby*, 9 Leigh (Va.), 387. Authority to a broker to sell and bind the owner by a contract must be certain and specific as to terms and description. *Gault Lumber Co. v. Pyles* (Okla. Supreme '07), 92 P. 175. Authority to sell land for cash and on long time did not authorize the broker to make the notes for deferred payments payable on or before certain dates. *Colvin v. Blanchard* (Tex. Civ. App. '07), 106 S. W. 323. Authority, in writing, to sell for \$19,000, to net the owner \$18,000, was held to authorize the agent to execute a contract of sale. *Id.* A broker authorized to sell for \$8,000, \$3,000 cash, is entitled to commissions on finding one willing to pay cash on delivery of the deed. *Goss v. Broom*, 31 Minn. 484.

In the absence of special authority a broker has no power to conclude a contract for the purchase and sale of lands. *Hamilton v. Cutts*, 6 Mackey (D. C.), 208; *Ryan v. McGee*, 2 Mackey (D. C.), 17; *Coleman v. Garrigue*, 17 Barber (N. Y.), 60; *Halsey v. Monterio*, 92 Va. 581, 24 S. E. 258; *McCullough v. Hitchcock*, 71 Conn. 401, 42 A. 81; *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818; *Balkeme v. Scarles*, 116 Iowa, 374, 89 N. W. 1087; *Dickman v. Updike* (N. J. Err. & App. '01), 49 A. 712; *Armstrong v. Lowe*, 76 Cal. 616, 18 P. 758; *Jones v. Halladay*, 2 App. Cas. (D. C.) 277; *Mannix v. Hildreth*, 2 App. Cas. (D. C.) 259; *Roach v. Coe*, 1 E. D. Smith (N. Y.), 175; *Brandrup v. Britton*, 11 N. D. 376, 92 N. W. 453; *Carstens v. McReavy*, 1 Wash. 359 25 P. 471; *Keim v. Lindley*, 54 N. J. Eq. 418, 30 A. 1063.

A real estate broker employed to find a purchaser is not authorized to execute a contract of sale in behalf of his principal; his authority is limited to the power of finding a purchaser satisfactory to the principal, where there is no stipulation, express or implied, to the contrary. *Rutenberg v. Main*, 47 Cal. 213; *Rundle v. Cutting*, 18 Colo. 337, 32 P. 994; *Malone*

v. *McCullough*, 15 Colo. 460, 24 P. 1040; *Johnson v. Dodge*, 17 Ill. 433; *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Stillman v. Fitzgerald*, 37 Minn. 186, 33 N. W. 564; *Scull v. Brontim*, 55 N. J. Eq. 489, 37 A. 740; *O'Reilly v. Keim*, 54 N. J. Eq. 418, 34 A. 1073; *Edwards v. Davidson* (Tex. Civ. App. '04), 79 S. W. 48; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914; *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35.

While it is true that the power to sign the name of the principal may be given verbally, the words used for the purpose should be distinct and clear in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker. *Duffy v. Hobson*, 40 Cal. 240.

Where an agent is employed to secure a purchaser for real estate within a certain time, for certain commissions, he can not recover unless he furnishes a purchaser within that time. *Ice v. Maxwell*, 61 West Va. 9, 55 S. E. 899.

Laws of 1893, p. 161, provides that in cities of 300,000 inhabitants or more, any person who shall offer for sale any real property, without the written authority of the owner of such property, etc., shall be deemed guilty of a misdemeanor. Defendants, husband and wife, at plaintiff's request, delivered to plaintiff a written option prepared by defendants, whereby they agreed to sell certain property for a given price and on the day following, defendant's wife, the owner of the property, offered in writing to pay plaintiff a certain commission on a sale at the price named. *Held*, that the two writings, when construed together, authorized plaintiff to sell the property. *Holbrook-Blackwell R. E. Co. v. Hartman*, 128 Mo. App. 228, 106 S. W. 1115.

The ordinary authority of a real estate agent to sell land is simply to find a purchaser, he having no power to bind his principal by a contract of sale, unless it appears that it was intended to confer upon him such additional authority. *Stemler v. Bass*, 153 Cal. 79, 96 P. 809; *Weatherhead v. Ettinger*, 78 O. S. 104, 84 N. E. 598; *Foss Inv. Co. v. Ater*, 49 Wash. 446, 95 P. 1017.

Ordinarily a broker has no implied authority to buy or sell

the property of another in his own name. *Reed v. Light*, 170 Ind. 550, 85 N. E. 9.

Though the expression "to sell" is sometimes used in the sense of an executed contract of sale, or an agreement to sell, as defined by Civil Code, Sec. 1727, the expression, when used in a contract giving a real estate broker the exclusive right "to sell" real estate, has acquired a restricted meaning, and, standing alone, the words "to sell" are not sufficient to authorize the broker to enter into a contract of sale binding the owner. *Bacon v. Davis*, 9 Cal. App. 65, 98 P. 71.

Where a broker's contract of authority authorized him to negotiate for a sale of the lands in question at \$5 per acre for thirty days, and the owners bound themselves to execute good conveyances to such purchasers as the broker might produce, on payment of the price, the term "negotiate" imported authority on the part of the broker to make a binding sale agreement and the contract therefore did not limit the authority to find a purchaser ready and able to pay the price. *Combes v. Adams*, 63 S. E. 186; *Combes v. Stewart*, 150 N. C. 64.

An agent employed to sell real estate, and not authorized to execute a contract of sale or an instrument of conveyance, is only an agent to find a buyer. *Manker v. Tough* (Kan. Sup. '08), 98 P. 792.

Where before the time limited for selling the property expired, the broker requested an extension of time, which the principal refused, the fact that in doing so he stated to the broker that he hoped that he would sell the property, and that he would be glad to assist him, did not confer an authority upon the broker to sell the property after the expiration of the time limited. *La Force v. Wash. Univ.*, 106 Mo. App. 517, 81 S. W. 209.

Under the Code defining "sell" as a contract by which one engages for a price to transfer to another a certain thing, etc., an instrument executed by an owner employing a broker to procure a purchaser of real estate, which recites that in consideration of the services of the broker the owner authorizes him "to sell for me, in my name, and receipt for deposit thereon," for a specified time, the property described, for a price fixed, and agrees to "sell and convey by a good . . . grant,"

etc., gives the broker authority to contract for the sale to a purchaser procured by him. *Bacon v. Davis*, 9 Cal. App. 65, 98 P. 71.

Where a broker's contract of authority authorized him to negotiate for a sale of the land in question at \$5 per acre for thirty days, and the owners bound themselves to execute good conveyances to such purchasers as the brokers might produce, on payment of the price, the term "negotiate" imported authority on the part of the brokers to make a binding contract of sale, and the contract did not therefore limit their authority to finding a purchaser ready, able and willing to pay the price. *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186.

CHAPTER III.

SECTION.

19. *Nudum pactum*, a contract to be effective must be based upon a consideration.
20. Unilateral contracts.
21. Consideration as an essential

SECTION.

- constituent of an enforceable contract.
22. Revocation of authority granted to the agent.
23. Repudiation or rescission of the contract.

Sec. 19. *Nudum pactum*, a contract to be effective must be based upon a consideration.

A contract by a person having no interest in the transaction, to pay a commission if a sale is effected, is void, unless supported by a consideration. *Smyth v. Mack*, 19 N. Y. S. 347, 64 Hun, 639. Release of an existing indebtedness for commissions, due in a mutual contract for the sale of land, is a new contract and must be based on a consideration, and an oral statement by the agent that he claims no commissions is not therefore sufficient to show a release. *Metcalf v. Kent*, 104 Iowa, 487, 73 N. W. 1037; *McComb v. Von Ellert*, 27 N. Y. S. 372, 7 Misc. R. 59. See also Sec. 788.

Where A, without any existing employment, exhibits a house to one who rents from the owner, a promise by the owner, made thereafter, to pay A for his services, is without consideration. *Sharp v. Hooper* (N. J. Sup. '06), 64 A. 989; *Bagnole v. Madden*, 69 A. 967, 76 N. J. L. 255; *Wolverton v. Tuttle*, 51 Ore. 501, 94 P. 961.

Where a broker was employed to effect an exchange of properties and has earned his commissions by obtaining a valid agreement therefor, an agreement subsequently made to claim no commissions, unless deeds pass or his client's title proves unmarketable, is without consideration. *Moskowitz v. Hornberger*, 46 N. Y. S. 462, 20 Misc. Rep. 558; *Rohkohl v. Sussman*, 113 N. Y. S. 586, 61 Misc. 246. See also Sec. 788.

A broker is not entitled to commissions on an exchange of properties, where he did nothing, and does not show that he was excused from rendering services. *Walton v. McMorrow*, 39 N. Y. App. Div. 667, 57 N. Y. S. 691. The mere insertion in an instrument that it is irrevocable, is without consideration and inoperative. *Walker v. Denison*, 86 Ill. 162. An agreement by an agent, through misstatement, to reduce his commissions was held to be without consideration. *Dayton v. Am. Steel Range Co.*, 73 N. Y. S. 316, 79 N. Y. S. 1130, 76 App. Div. 454, 36 Misc. R. 223. An agreement to pay an agent two and one-half per cent. on sales made by the vendor is without consideration. *Wright v. Fulling*, 93 N. Y. S. 228, 104 App. Div. 49. Compare Sec. 42.

A promise made under an erroneous belief to pay a commission is without consideration, no service having been rendered, and the broker is not entitled to recover. *Bellesheim v. Palm*, 66 N. Y. S. 273, 54 App. Div. 77.

Where defendant agreed to pay plaintiff the reasonable value of his services, and there was no agreement that such value should be fixed by defendant, at least until after the services had been performed, such a stipulation was unilateral, without consideration, and not enforceable. *Walker Mfg. Co. v. Knox*, 136 Fed. 334, 69 C. C. A. 160.

Where an owner of land revoked an agent's authority to sell, and told the agent that he would be taken care of as if he had made the sale, and the owner then made a sale through his own efforts, the promise to the broker was without consideration. *Cronin v. American Securities Co.* (Ala. Sup. '09), 50 S. 915.

Sec. 20. Unilateral contracts.

Although an agreement signed by a real estate owner to pay an agent a certain commission in the event that the owner shall make a sale is a unilateral contract, and invalid on its face, yet where the agent goes to the expense of advertising and endeavoring to sell, this is a sufficient partial performance to render it enforceable. *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780; *Schoenman v. Whitt*, 136 Wis. 332, 117 N. W. 851.

Where defendant was authorized by the owner of land to

sell it and agreed to share the commissions with the plaintiff, in case the latter found a purchaser, the contract was unilateral, and binding on neither party until the plaintiff found a purchaser. *Wefel v. Stillman*, 151 Ala. 249, 44 S. 203. See also Sec. 397.

A contract by the owner to pay another a commission on a sale of property, whether effected by the owner or agent, is a unilateral contract, and where the owner unaided in any way by the agent, effects a sale, the agent can not recover commissions; but if the agent effects the sale his commissions are recoverable. *Taylor v. Barbour*, 90 Miss. 885, 44 S. 988; *Humphries & J. v. Smith*, 5 Ga. App. 340, 63 S. E. 248.

Sec. 21. Consideration as an essential constituent of an enforceable contract.

Where one employs another as agent to sell land, the contract is based upon a sufficient consideration. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Gilmore v. Samuels* (Ky. Ct. App. '09), 123 S. W. 271. The lower price for which defendants secured the real estate is a sufficient consideration to support an agreement to pay plaintiffs a certain sum as commissions, in order to obtain the property at the price for which the owner was willing to sell it, provided he was relieved from the payment of commissions, the owner not being willing to sell at that price unless he was so relieved. *Deitsch v. Feder*, 86 N. Y. S. 802.

An agreement made by a broker after the sale to wait for the payment of his commissions until the title passed, was unsupported by a consideration. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. R. 546; *Shields v. Sterret* (N. J. Sup. '09), 71 A. 1129.

In States requiring a written contract with a broker to sell real estate, a subsequent express promise to pay the broker a commission is without consideration to support an oral employment. *Stout v. Humphrey*, 69 N. J. Law 436, 55 A. 281; *Bag-noli v. Madden*, 76 N. J. L. 255, 69 A. 967.

In another case in the same State, it was held that where the agent advertised the property for sale at auction and secured the services of an auctioneer, and the owner sold the

property privately and promised to pay the agent for his services, the promise was based upon a sufficient consideration. *Griffith v. Daly*, 56 N. J. Law 466, 29 A. 169.

An agent desisting from efforts to sell, upon the owner's promise to pay commissions, is a sufficient consideration to support a verdict for half the commissions. *Ware v. Kerwin*, 48 N. Y. S. 884, 24 App. Div. 198. Where the quantity of land fell short of what the owner supposed he possessed, and the broker agreed to a diminution of compensation, the agreement was upon a sufficient consideration. *Brunson v. Blair*, 44 Tex. Civ. App. 43, 97 S. W. 337. A broker who introduced a prospective buyer to the owner prior to his employment as agent, and the owner made the sale himself, was held not entitled to a commission. *Bassford v. West*, 124 Mo. App. 248, 101 S. W. 610; see, also, Sections 68 and 450. A release of an existing debt for commissions is a new contract and must be based on a consideration. *Metcalfe v. Kent*, 73 N. W. 1037, 104 Iowa, 487. Where a broker, requested by the owner of property to find a purchaser at a certain price, showed the property to the defendant, who told him he could do better by buying it himself from the owner, and if he bought would pay the broker a commission, the promise was a sufficient consideration. *Abraham v. Goldberg*, 25 N. Y. S. 1113, 6 Misc. R. 43.

A contract for such time as may be mutually agreeable, did not bind plaintiff except for what had been actually done, and a subsequent agreement with defendant to pay a different rate for effecting the sale of a particular property was upon a valid consideration. *Forbes v. Bushnell*, 47 Minn. 402, 50 N. W. 368. In an action by a broker to recover commissions for a sale of real estate to the United States, the only service shown by plaintiff that he intensified public opinion to establish a military post in the neighborhood, was held to be an insufficient consideration to support a verdict for the plaintiff. *Com'l Nat. Bk. v. Hawkins*, 35 Ill. App. 463.

Sec. 22. Revocation of authority granted to the agent.

If a broker has had a reasonable time to find a purchaser, the principal may, in good faith, revoke the employment without incurring liability. *Blumenthal v. Goodall*, 89 Cal. 251, 26

P. 906; *Collier v. Johnson*, 23 Ky. L. R. 2453, 67 S. W. 830; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; *Jayne v. Drake* (Miss. Sup. '06), 41 S. 372; *Kolb v. Bennett*, 74 Miss. 567; *Turner v. Snyder*, 132 Mo. App. 320, 111 S. W. 858; *Loving v. Hesperian C. Co.*, 176 Mo. 330, 75 S. W. 1095; *Miller v. Wehrman* (Neb. Sup. '08), 115 N. W. 1078; *Slater v. Holt*, 10 N. Y. St. 257; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119; *Simpson v. Carson*, 11 Oregon, 361, 8 P. 325; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892; *Evans v. Gay*, 38 Tex. Civ. App. 442, 74 S. W. 575; *Knox v. Parker*, 2 Wash. 34, 25 P. 909; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Cronin v. American Securities Co.* (Ala. Sup. '09), 50 S. 915.

A principal revoking the agency must act in good faith, and not for the purpose of evading liability for the broker's services, *Bailey v. Smith*, 103 Ala. 641, 15 S. 900; *Uphof v. Ulrich*, 2 Ill. App. 399; *Beeler v. Cresswell*, 3 Md. 196; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; *Alden v. Earle*, 56 N. Y. Super. Court. 366, 4 N. Y. S. 548; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Peach River Lumber Co. v. Montgomery* (Tex. Civ. App. '08), 115 S. W. 87. If the broker has found a responsible purchaser before the receipt of the notice of revocation the principal will be liable on his contract for commissions. *Tilden v. Smith* (S. D. Sup. '10), 124 N. W. 841; *Montgomery v. Ainslie* (Tex. C. A. '09), 122 S. W. 307; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; *Reishus-Remel Ld. Co. v. Benner*, 91 Minn. 401, 98 N. W. 186; *Canadian Imp. Co. v. Cooper*, 161 Fed. 279. Power to revoke must be distinguished from the right to revoke. Mechem on Ag., Sec. 209.

Where the only instructions given to an agent are that he shall visit a certain addition, sell some lots and pay the sum demanded as part of the price, without any limitation upon his discretion, the principal cannot rescind any contract made by the agent for the purchase of lots, or recover any sum paid on account thereof, unless a failure of consideration, a defect in the title, or other like circumstance be made to appear. *Boulder Inv. Co. v. Fries*, 31 P. 174; 2 Colo. App. 373. An agency coupled with an interest is, within the time stated, irrevocable. *Bird v. Phillips*, 115 Iowa, 703, 87 N. W. 414; *Stamets v. Denni-*

son, 193 Pa. St. 548, 44 A. 575. The death of the principal or a partial destruction of the subject-matter works a revocation. *Cox v. Bowling*, 54 Mo. App. 289. Also the principal's disposition of his interest in the subject-matter of the agency. *Frazier v. Cox* (Ky. Ct. App. '10), 125 S. W. 148.

A contract of agency cannot, but in good faith, be revoked before the expiration of the time allotted and the principal escape liability to the broker. *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175; *Stamets v. Dennison*, 193 Pa. St. 548; compare *Harrison v. Angerson*, 115 Ill. App. 226. A broker is not entitled to commissions on a sale by the owner of real estate made in good faith after the revocation of his authority to one with whom the broker negotiated before the time expired. *Zeiner v. Antisell*, 75 Cal. 509, 17 P. 642; *Farrar v. Brodt*, 35 Ill. App. 617; *Learned v. McCoy*, 4 Ind. App. 238, 30 N. E. 717; *Fultz v. Winer*, 34 Kan. 576, 9 P. 316; *Antisdell v. Canfield*, 119 Mich. 229, 77 N. W. 944; *LaForce v. Wash. Uni.*, 106 Mo. App. 517, 81 S. W. 209; *Page v. Griffith*, 71 Mo. App. 524; *Gardner v. Pierce*, 116 N. Y. S. 155; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Satterthwaite v. Vrceland*, 48 How. Pr. (N. Y.) 508, 3 Hun, 152; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Cardy v. Ruth*, 100 N. Y. S. 1043, 115 App. Div. 568, 103 N. Y. S. 1121; *Newton v. Conness* (Tex., Civ. App. '08), 106 S. W. 892; *Siegel v. Rosenzweig*, 114 N. Y. S. 179; compare *Griswold v. Pierce*, 86 Ill. App. 406, *et al.*, Sec. 557.

A contract of agency is revoked by a notice of the exercise of an option to purchase. *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. R. 243, 80 S. W. 1171. A vendee, defrauded by his agent, may rescind the contract of sale and reclaim the money paid. *Kennedy v. McKay*, 43 N. J. L. 288. Where defendant authorized the plaintiff to sell his farm at \$50 an acre, a letter of plaintiff desiring a modification so as to sell at \$48 or \$49 an acre did not operate to revoke the plaintiff's first authority. *Fuller v. Brady*, 22 Ill. App. 174. Acts of the agent after a revocation bind the principal as to third parties without notice. *Murphy v. Ottenheimer*, 84 Ill. 39; *Beard v. Kirk*, 11 N. H. 397; *Hancock v. Byrne*, 5 Dana (Ky.), 514; *Lamothe v. St. Louis, etc., R. Co.*, 17 Mo. 204. After the revocation of written author-

ity, his acts, if the writing be left in the hands of the agent, may bind the principal by the agent's exhibiting the instrument as his apparent authority to parties without notice. *Beard v. Kirk*, 11 N. H. 397; Story on Ag., Sec. 470.

Where a real estate broker, employed to procure a purchaser for a farm, procured a buyer who agreed with the owner on the terms of sale, and the buyer was given to a fixed date to purchase, unless the owner sold in the meantime, before the time fixed the buyer told the owner that he would not buy without also procuring adjacent land, which he could not do, the owner then stated to the buyer that the matter was settled between them, and later, on the same day, the buyer told the owner that he would take the farm on the terms agreed, it was held that the broker had earned his commission, though no sale was made, the owner's statement to the buyer not constituting a revocation of the broker's authority to procure a buyer. *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157; compare *Bailey v. Morehead*, 122 Mo. App. 268, 99 S. W. 973.

The revocation of a contract with an agent to take charge of property, rent the same and collect the rents, before any rents were collected, made the principal liable to compensate the agent for the services rendered. *New Kanawha C. & M. Co. v. Wright*, 163 Ind. 529, 72 N. E. 550. Defendant agreed to pay plaintiff one dollar an acre for finding a purchaser for a certain farm at \$37.50 per acre; after introducing a purchaser, but before sale, defendant wrote the plaintiff that he had no hopes of making a sale to such prospective purchaser, and that the owners of the land required \$35 net per acre, which price had been quoted to the proposed purchaser, that if plaintiff still desired to assist, to make his commissions from the purchase price over \$35 per acre, he was at liberty to proceed, otherwise the arrangement would be revoked; it was held that such letter did not constitute a revocation of plaintiff's authority so as to deprive him of the right to the contract commission, on the subsequent consummation of a sale to such purchaser. *Provident Trust Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030.

Where a broker was employed to sell land for \$75,000 at a commission of \$2,000, and after he had introduced a purchaser his authority was revoked and the land was sold by his employer

for \$65,000, the broker was held entitled to recover only his contract commissions, with interest thereon, and not the customary commissions, or the reasonable value of his services. *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055, 13 D. L. N. 853; see, also, Sec. 572. The fact that the broker, not having an exclusive agency, has entered into a contract of sale on different terms, of which the principal has no notice, does not affect the principal's right to revoke the agency through a previous sale to another. *Weisels-Gerhart R. E. Co. v. Wainwright*, 127 Mo. App. 514, 105 S. W. 1096.

An exclusive agency, for a valuable consideration, given for a period of seven days, was revoked by notice within the time, so that a purchaser who bought from the agent after such revocation, though within the seven days, had no enforceable contract of sale, the agent, however, might have an action against his principal for a breach of the contract. *Norton v. Sjolseth*, 43 Wash. 327, 86 P. 573; compare *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412. In a well considered case it was held that a revocation in fraud of a broker's rights would not amount to a revocation. *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412. This, however, conflicts with the doctrine of the owner's power to revoke. Mechem on Ag., Sec. 209.

Defendant signed a contract reciting a sufficient consideration by which he authorized plaintiffs, as his agents, to sell a tract of land for a stated price, and to execute a binding contract in that behalf. Afterward, defendant wrote plaintiffs that his wife refused to sign a deed for such price, stating that they might as well take the land off the market. To this plaintiff replied, in effect assenting, and asking for defendant's lowest price for the land, and stating, "When we hear from you we will see what we can do." Held, that by such letters the agency was entirely abrogated, leaving the matter at large for new negotiations between the parties. *Lacey v. Thomas*, 164 F. 623.

An agreement by an owner of premises, upon a valuable consideration, to extend the time within which the broker might sell, to such time as the broker could get a prospective purchaser to bind itself to buy cannot be cancelled by the owner, without the broker's consent, so long as negotiations are going on between the broker and the prospective purchaser with a prospect of

eventual sale within a reasonable time. *Luhn v. Fordtran* (Tex. Civ. App. '09), 115 S. W. 667, writ of error denied by Supreme Court. The dissolution of a partnership will operate as a revocation of the power to sell; but a mere change in the name of the firm, where the new firm is composed of the same members as the old, does not operate to revoke an agency, conferred upon it, the identity remaining the same. *Mechem on Agency*, Sec. 221.

Where a broker is not employed for a definite time, the employment may be revoked at will; but where he is employed for a definite time, the agency can be revoked only in accordance with some express or implied condition of its continuance. *Blumenthal v. Bridges* (Ark. Sup. '09), 120 S. W. 974. Under a contract of employment of a broker for a definite term, where the principal has not the right to revoke the agency directly, he cannot do so by selling the property himself. *Blumenthal v. Bridges* (Ark. Sup. '09), 120 S. W. 974. See Sec. 490.

Sec. 23. Repudiation or rescission of the contract.

If a purchaser wishes to repudiate a contract to purchase on the ground that his agent has secretly received commissions from the seller, he must act promptly and make restitution as far as possible. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189. A broker is not entitled to commissions where the purchaser repudiates an informal contract. *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572; *Sloman v. Bodwell*, 24 Neb. 790, 40 N. W. 321. Or an unauthorized contract. *Myers & King v. Coleman* (Miss. '08), 46 S. 249. The same is true where the vendor promptly repudiates a contract of sale, made subject to his approval, and returns the money paid to the purchaser. *Powell v. Binney*, 54 Neb. 690, 74 N. W. 1073. Where an agent was authorized to execute a note and mortgage on land purchased, the principal was precluded from repudiating the act. *Fouch v. Wilson*, 59 Ind. 13.

Where a decedent, prior to the purchase of real estate, agreed to pay plaintiff who negotiated the purchase one-third of the profits to be derived from a subsequent sale thereof; no time for the sale was fixed and the purchaser having died without making sale, his personal representative repudiated plaintiff's interest and refused to sell, though the property had largely

increased in value; it was held that decedent under the contract was required to make a sale within a reasonable time, and after repudiation of plaintiff's rights he was entitled to recover one-third of the value of the land in cash, after deducting the purchase price, taxes and interest. *Kauffman v. Bailie*, 46 Wash. 248, 89 Pac. 548.

Where an owner takes no steps to repudiate a contract made by an agent, and accepts the benefits thereunder, he ratifies the contract and is liable to the purchaser for a breach thereof. *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. R. 137. In order to obtain the rescission of an agreement, where the broker had been guilty of constructive fraud, the purchaser was required to pay the former the value of his services. *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861. Delay in bringing suit for the rescission of a contract on the ground of fraud does not defeat the right to the relief sought, where there has been no change in the position of the parties to render it inequitable. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189. Compare *Bassett v. Brown*, 105 Mass. 551. The repudiation of a contract by the vendee bars recovery of the installments of purchase money paid. *McKinne v. Harvie*, 38 Minn. 18, 35 N. W. 668.

CHAPTER IV.

SECTION 24. Ratification.

Sec. 24. Ratification.

Before a principal can be bound upon the ground of ratification, it must appear that he had full knowledge of all the material facts affecting his interest in the transaction. *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962; *Kerr v. Sharp*, 83 Ill. 199; *Rowan v. Hyatt*, 45 N. Y. 138; *Ferguson v. Gooch*, 24 Va. 1, 26 S. E. 397; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953. See also Sec. 624.

The ratification of the act of an unauthorized broker makes the principal liable to compensate him for his services. *Merrill v. Latham*, 8 Colo. App. 263, 45 P. 524; *Hoyt v. Tuxbury*, 70 Ill. 331; *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388; *Dayton v. Am. Steel Barge Co.*, 73 N. Y. S. 316, 36 Misc. 223. See also Secs. 620, 621.

The same rule holds true where the broker was employed by an unauthorized third party. *McKinnon v. Hope*, 118 Ga. 462, 45 S. E. 413; *Hurt v. Jones*, 105 Mo. App. 106, 79 S. W. 486; *Charles v. Cook*, 84 N. Y. S. 867, 88 App. Div. 81; *Lyle v. Bennett*, 70 N. Y. S. 283, 34 Misc. 476; *Markham v. Washburn*, 18 N. Y. S. 355; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256; *McCormack v. McCaffery*, 74 N. Y. S. 836, 36 Misc. 775. This is especially the case if at the time the principal has knowledge that the broker assumed to act for him. *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269; *Gillespie v. Dick* (Tex. Civ. App. '08), 111 S. W. 664.

In the absence of a contract of employment, it is sufficient that the defendant adopted and ratified the plaintiff's acts. *Chilton v. Butler*, 1 E. D. Smith (N. Y.), 150; *Lauler v. Armstrong* (Wash. Sup. '09), 102 P. 775. And such ratification relates back to the making of the contract. *Clark v. Van Reins-*

deck, 9 *Cranch* (U. S.), 153; *Roby v. Cassitt*, 78 Ill. 638; *Goodell v. Woodruff*, 20 Ill. 191; *Bell v. Byerson*, 11 Iowa, 233; *Barbour v. Craig*, 6 Litt. (Ky.) 213; *Myers v. Simmons*, 19 La. Ann. 370; *Williams v. Mitchell*, 17 Mass. 98; *Lowry v. Harris*, 12 Minn. 255; *Baker v. Byrne*, 10 Miss. 193; *Cowan v. Wheeler*, 31 Me. 439; *Despatch, etc., v. Bellamy Mfg. Co.*, 12 N. H. 205; *Lyons v. Pyatt*, 51 N. J. Eq. 60, 26 A. 334; *Como v. Pt. Henry Co.*, 12 Barb. (N. Y.) 27; *Weisinger v. Wheeler*, 14 Wis. 109.

A principal, however, is not bound by the ratification of a sale of real estate made by a broker, if the approval was brought about by misstatements of the broker as to the terms of the sale. *Rowan v. Hyatt*, 45 N. Y. 138; *Edwards v. Davidson* (Tex. Civ. App. '04), 79 S. W. 48; *Halscy v. Monteiro*, 92 Va. 581, 24 S. E. 258.

Although the written agreement entered into by the broker may have been so imperfectly executed as not to bind either of the principals, they both ratified it and became bound by its provisions, by their letters and by the execution and tender of the deed for the premises. *Lyons v. Pyatt*, 51 N. J. Eq. 60, 26 A. 534; *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. R. 137.

A sale of real estate by the owner to a purchaser with whom a broker had unauthorizedly negotiated was not a ratification of the agency of such broker. *Loving Co. v. Hesperian Cattle Co.*, 176 Mo. 330, 75 S. W. 1095; *Copeland v. Stoneham Tannery Co.*, 142 Pa. St. 446, 21 A. 825; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953. See also Sec. 618.

In other cases, where the broker negotiated sales in violation of his instructions, and the owner, by correspondence or otherwise, agreed thereto, the acts were ratified. *Sleeper v. Murphy*, 120 Iowa, 132, 94 N. W. 275; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882; *Smith v. Schiele*, 93 Cal. 144, 28 P. 857; *Nesbit v. Helser*, 49 Mo. 383; *Suydam v. Vogel*, 84 N. Y. S. 915.

Where, by the terms of the contract a warranty deed should have been executed at a certain time, and about that time a special warranty deed was forwarded to the owner who had executed the contract, by a clerk in the office of one who had authority to collect rents, etc., for the land-owner, the purchaser refused to accept such deed, and the one who had executed the contract returned it to the sender; subsequently a letter was re-

ceived by the one who had executed the contract stating that the land-owner would execute no other deed, signed with the firm name, one of the names being the same as that of the land-owner, but he was not shown to have been a member of the firm. *Held*, that it not appearing that the owner knew of the contract, no ratification was shown. *Topliff v. Shadwell*, 64 Kan. 884, 67 P. 545; *Stemler v. Bass*, 153 Cal. 791, 96 P. 809; *Foss Inv. Co. v. Ater*, 49 Wash. 446, 95 P. 1017; *Larson v. Newman* (N. D. Sup. '09), 121 N. W. 202.

A broker procured to be made to himself a deed of land which he was employed to sell, the grantor intending it only as a means of carrying into effect a supposed sale to a third party, but the grantee secretly intending to obtain the land to his own use, and also fraudulently misrepresenting the value of the consideration, which consisted of certificates of stock in mining companies. *Held*, that the deed was not void, but only voidable, and that if the grantor, who soon learned the facts entitling him to an avoidance, neglected for more than two years to do any act to avoid it, and exchanged the stock for other stocks, he must be taken to have ratified the conveyance, and could not maintain a writ of entry to recover the land. *Bassett v. Brown*, 105 Mass. 551. Compare *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189.

Where defendant's husband had an interview with plaintiff in regard to a sale of her land, and that in response to a letter from plaintiff the husband called at the office and was introduced to T, and the latter showed defendant and her husband land that he wished to exchange, but it did not satisfy defendant; afterward she accepted another offer made by T. to buy the land; on the trial defendant and her husband attempted to suppress their own testimony, and their conduct justified the belief that defendant had authorized or ratified her husband's act. *Sims v. Rockwell*, 156 Mass. 372, 31 N. E. 484.

An unauthorized contract of sale is binding upon a principal when ratified through another duly authorized agent. *Hoyt v. Tuxbury*, 70 Ill. 331. A principal may, by accepting the proceeds, ratify a sale made by his broker upon false representations. *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706; *Powell v. Gasson*, 18 B. Monroe (Ky.), 179; *Stockbridge v. West Stock-*

bridge, 14 Mass. 257, 261; *Vaughn v. Sheridan*, 50 Mich. 155; *Krumer v. Beach*, 25 Hun (N. Y.), 293; *Roberts v. Hilton Ld. M. Co.*, 45 Wash. 464, 88 P. 946. See also Sec. 622. Ratification may arise from long acquiescence. *Kehler v. Kemble*, 26 La. Ann. 713; *Hull v. Harper*, 17 Ill. 82; *Williams v. Merritt*, 23 Ill. 623. From the bringing of a suit by the principal to acquire the benefit of the acts of the alleged agent. *Bank of Beloit v. Beale*, 34 N. Y. 473; *Carsee v. Paul*, 41 N. H. 24; *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245; *Folger v. Mitchell*, 3 Pick. (Mass.) 396. By a letter from the principal to his agent authorizing certain acts, although received after their performance. *Rice v. McLaren*, 42 Me. 157.

No act is capable of ratification unless performed by the agent in behalf of his principal. *Collins v. Snow*, 7 Robt. (N. Y.) 623; *Com. Bank v. Jones*, 18 Tex. 811; *Fellows v. Commissioners*, 36 Barb. (N. Y.) 655.

The policy of the law will not permit a principal to ratify an unauthorized act in part and repudiate the remainder; it must be accepted or rejected as an entirety. *Fisher v. Stevens*, 16 Ill. 397; *Henderson v. Cummings*, 44 Ill. 325; *Wedner v. Lane*, 14 Mich. 124; *Elwell v. Chamberlain*, 31 N. Y. 611; *Coleman v. Stark*, 1 Ore. 115; *Bishop v. Stewart*, 13 Nev. 25; *Newell v. Hurlbut*, 2 Ver. 351; *Kyle v. Rippey*, 20 Oregon, 446, 26 P. 308.

A principal taking possession, knowing of a mortgage given by the agent to purchase the land for the unpaid purchase money, and a note executed at the same time by the agent for the same purpose, ratified his acts. *Fouch v. Wilson*, 59 Ind. 93.

A principal will not be held to have ratified unauthorized acts of his agent unless, at the time, he was fully aware of all the circumstances. *Owings v. Hall*, 9 Peters (U. S.), 607; *Fedrick v. Rice*, 13 Iowa, 214; *Fletcher v. Dysart*, 9 B. Monroe (Ky.), 413; *Woodbury v. Larned*, 5 Minn. 339; *Pittsburg, etc., R. v. Gazzan*, 32 Pa. St. 340; *Hardeman v. Ford*, 12 Ga. 205; *Dodge v. McDonnell*, 14 Wis. 600; *Dickerson v. Conway*, 12 Allen (Mass.), 487; *Seymour v. Wychoff*, 10 N. Y. 213; *Stein v. Kendall*, 1 Bradwell (Ill.), 193; *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395.

Before a person can be bound by the ratification of the pur-

chase of certain real estate by his broker, instead of a particular lot, it must appear that he was informed of all the material facts in the transaction. *Kerr v. Sharp*, 83 Ill. 199; *Stein v. Kendall*, 1 Ill. App. 103.

Where an agent for the sale of real estate executed his instructions in selling a part of the property in regard to which he was authorized only to negotiate for a sale, and his principal afterward impliedly ratified all his acts by receiving the money for the sale of all the land, but it appeared that he did not know that the portion unintended had been sold. *Held*, that the agreement made by the agent was neither authorized nor ratified. *Lester v. Kinne*, 37 Conn. 9. The unauthorized deed of an agent, where still required to be sealed, can be ratified only by an instrument under seal. *Spofford v. Hobbs*, 29 Me. 148; *Drumright v. Philpot*, 16 Ga. 424; *Reese v. Medlock*, 27 Tex. 120. Where the instrument unauthorizedly executed by the agent did not require a seal, a written ratification without suffices. *Crozier v. Karr*, 11 Texas, 376; *Adams v. Power*, 52 Miss. 828.

In those States which do not require the authority of the agent to be in writing the principal may ratify by parol. 1 *Parsons* on Con. 52; *Hammond v. Hannin*, 21 Mich. 374. And in States where parol ratification prevails, the approval of the principal may be inferred from acts. *Hammond v. Hannin*, 21 Mich. 374. Where a written contract for the sale of lands was made by one to whom power therefor could not be delegated, such act may be ratified by an instrument in writing to satisfy the statute of frauds. *Newton v. Bronson*, 13 N. Y. 587.

In Pennsylvania an unauthorized lease of land by an agent for a longer period than three years can be ratified by the owner only in writing. *McDowell v. Simpson*, 3 Watts (Pa.), 129. When informed of the unauthorized acts of his agent the principal must, within a reasonable time, elect to approve or disapprove; if he does not disaffirm them the agent may presume that his conduct has been approved; silence will be equivalent to approval. *Meyer v. Morgan*, 51 Miss. 21; *Hawkins v. Sanger*, 22 Minn. 557.

One does not ratify the unauthorized acts of others in executing a contract of sale of his lots by merely remaining silent

a long time, he not having known of the facts and having been misled in important particulars by their letter, having received no benefits under the contract, and his silence not having caused the vendee to change his position for the worse. *Colvin v. Blanchard* (Tex. Sup. '07), 106 S. W. 323; affirming 103 S. W. 1118; *List & Son Co. v. Chase*, 80 O. St. 42.

A valid, binding ratification, when made, can not be revoked, but the principal must abide by it, whether it be to his detriment or to his advantage. *Watterson v. Rogers*, 21 Kan. 529. In the absence of express ratification by the principal, there must be an appropriation by him of the services of the broker under such circumstances as would render the withholding of remuneration therefor inequitable. *Atwater v. Lockwood*, 39 Conn. 45; *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158, *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. R. 137.

W, the president of the defendant company, agreed to pay the plaintiff a commission for procuring a purchaser of land which they thought belonged to W, but which belonged to the company, plaintiff procured a purchaser and W sold him the land—the company knew nothing of the contract with plaintiff, but ratified the sale and made a deed to the purchaser. *Held*, that plaintiff could not recover commissions from the company. *Copeland v. Stoneham Tannery Co.*, 142 Pa. St. 446, 21 Atl. 825.

A contract of sale of realty was made by one having no title nor authority to execute such an instrument; the attorney for the purchaser was informed by the equitable owner that such person was authorized to sell. *Held*, that such statement was a ratification of the agent's authority which estopped the equitable owner from denying it. *Gregg v. Corey*, 4 Cal. App. 354, 88 P. 282.

Where an agent is authorized to procure a purchaser for real estate at a fixed sum and for a stipulated compensation, he can recover the compensation when he procures a purchaser to whom the owner sells, although he accepts a less sum than that at which he authorized the agent to sell. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899; *Weeks v. Smith* (N. J. Sup. '10), 75 A. 773.

Where the defendant put real estate in the hands of the plaintiff to sell, directing him not to sell it, but, nevertheless, for-

getting the injunction placed upon him he did advertise the property, and a person reading the same went directly to the defendant who sold him the property, this was a ratification of plaintiff's departure from instructions, and the defendant was liable to the plaintiff for commissions. *Maloon v. Barrett*, 192 Mass. 552, 78 N. E. 560.

Where plaintiff, having obtained from the defendant a statement as to the price and terms at which to sell certain real estate, found a person able and willing to purchase on the terms stated, and notified the defendant, enclosing a deed for execution, which defendant executed and sent to one R, with a letter constituting R, his agent, to deliver the deed and complete the sale, if the terms were the best obtainable, defendant, through the said agent R, refused to accept such terms and refused to deliver such deed. *Held*, that these facts amounted neither to an acceptance of the plaintiff's proposal, nor to a ratification of the unauthorized acts of plaintiff in negotiating with a third person for the purchase of the property. *Harris v. Reynolds* (North Dak. '07), Supreme Court, 114 N. W. 369.

If a broker undertakes to modify his authority the principal may repudiate and decline to be bound thereby, or he may ratify his act and be bound by the change. *Phinizy v. Bush*, 129 Ga. 479, 59 S. E. 259. In a suit for commissions for finding a purchaser for land listed with brokers, and by them relisted with plaintiff's firm, it was essential to authorize a recovery that the land was so relisted by authority from defendant, either express or implied, unless after the land was listed with the first brokers, they so relisted it, and, defendant being aware of it, ratified the act. *Sterling v. DeLaune* (Tex. Civ. App. '07), 105 S. W. 1169.

Under the Missouri statute providing that no contract for the sale of real estate, made by an agent, shall be binding unless the agent be authorized in writing to make the contract, the ratification of the contract by the principal for the sale of land by the agent must be in writing, where no element of equitable estoppel exists. *Johnson v. Fecht*, 185 Mo. 335, 83 S. W. 1077.

Where a third party conducted negotiations, procured a loan, and drew the note and mortgage, on which suit was based, for defendant, though not authorized directly to do so for them, and

they accepted the loan and executed the note and mortgage, they thereby ratified the acts of such third party and were bound thereby as effectually as though they had expressly authorized him to act as their agent. *Marks v. Taylor*, 23 Utah, 470, 63 P. 897, 65 P. 203.

Where the contract of a sub-agent is ratified by the owner, in case of a sale the sub-agent may sue the owner for the commission, and is not limited to his action against the broker employing him. *Warren Com. & Inv. Co. v. Hull R. E. Co.*, 120 Mo. App. 432, 96 S. W. 1038; *Mechem on Agency* Secs. 197, 227.

Where the owner at first refuses an offer as too low, and discharges the broker, and thereafter, through another broker, accepts, he is liable to the first broker for commissions, the sale having been made to his customer at the price originally offered. *Gottschalk v. Jennings*, 1 La. Ann. 5; *Cadigan v. Crabtree*, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77; *Buehler v. Weiffenbach*, 46 N. Y. S. 861, 21 Misc. 30; *Peckham v. Ashhurst*, 18 R. I. 376, 28 A. 337.

Where a broker sent a customer to his principal, and the customer told him that the broker had shown him the land, this was held sufficient to bind and obligate the principal to pay the broker for the services he rendered in procuring the purchaser. *Reishus-Reiner Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186.

A co-agent, under a power to sell, is not bound by an unauthorized option, not given or ratified by himself, and if he purchases the land for himself, can not be held as a trustee for the claimant under the option. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. R. 977. An owner who has sanctioned sales by accepting the proceeds can not contend that the power of attorney did not authorize the sales. *Vaughn v. Sheridan*, 50 Mich. 155. A principal appropriating the benefits of an unauthorized act of a broker becomes liable by the ratification to compensate him for his services. *Merrill v. Latham*, 8 Colo. App. 263, 45 P. 524; *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388; *Dayton v. Am. Steel Barge Co.*, 73 N. Y. S. 316, 36 Misc. 223.

A real estate agent inquired of an owner whether he would

sell real estate for \$6,500 cash, clear of special taxes. The owner replied that he would sell for that sum, net. The agent contracted with a purchaser for a sale at \$7,000, payable on delivery of a warranty deed and abstract, all assessments to be paid, and notified the owner of the sale and requested an abstract. The owner sent an abstract, and stated that it was his understanding that the price was \$6,500 net, and that he would pay no back taxes or any other expenses. *Held*, that the contract was not enforceable against the owner, since he neither authorized the agent to make it, nor ratified it. *Hutchins v. Wertheimer*, 51 Wash. 539, 99 P. 577. See references under Sec. 307.

CHAPTER V.

SECTION.

25. Privity.

26. The power of attorney, its extent and limitations.

27. The attorney in fact.

SECTION.

28. Assignees and assignments.

29. Attorneys at Law.

30. Auctions and Auctioneers.

Sec. 25. Privity.

In the absence of contractual relations, a sub-agent is not entitled to recover from the owner for want of privity. *J. B. Watkins Ld. Mtge. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72; *Sterling v. DeLaune* (Tex. Civ. App. '07), 105 S. W. 1169. See also Sec. 393. *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276; Mechem on Ag. Secs. 197, 227; *Mueller v. Bell* (Tex. Civ. App. '09), 117 S. W. 993.

Fraudulent representations made to the principal by third parties in privity with the broker, defeat his right to commissions. *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790. See also Secs. 390, 391. If A is employed as a broker to sell B's house, on an agreement that he will inform B, if he sends a purchaser, and A and C then agree that if C will procure a purchaser, he shall share with A in the commission, and C, in going to look at the house, tells B that no broker has anything to do with the trade, and a price is named on that understanding, and the house is bought by a purchaser procured by C. A and C are partners in the business of effecting a sale of B's house to such purchaser, and C's fraud, though not participated in by A, will bar an action by A against B for the commission, prosecuted for the joint benefit and at the joint expense of A and C. *Thwing v. Clifford*, 136 Mass. 482; *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21.

A broker employed to sell real estate is unable, for want of privity, to enforce a stipulation in the contract of sale between vendor and vendee by which the latter agrees to pay the

commission. *Bab v. Hirschbein*, 11 N. Y. S. 776; *Gridley v. Bayless*, 43 Ill. App. 503; *Lawyer v. Post*, 109 Fed. Rep. 512, 47 C. C. A. 491; *Davenport v. Ash*, 121 La. 209, 46 S. 213; *Le Master v. Dotham Real Est. Ag.* (T. C. A. '09), 121 S. W. 185. See also Sec. 662. For the same reason, a purchaser can not, in an action *ex contractu*, recover from the agent of the seller the excess paid to the agent beyond the price demanded by the seller. *Lazarus v. Sands*, 27 N. Y. S. 885, 7 Misc. R. 282, 33 N. Y. S. 855, 12 Misc. R. 575.

Where an agent to sell property sells to a firm of which he is a member, without the knowledge of the principal that he is interested in the purchase, the partners of the agent can not recover damages of the principal on account of misrepresentations made by the agent, they being parties to his violation of his trust. *Pineville v. Hollingsworth*, 21 Ky. L. R. 899, 53 S. W. 279.

Purchasers of land were under no legal obligation to the owner's broker, and could so arrange the purchase as to permit another broker to procure the commission, though the owner's broker drew their attention to the property, and he has no cause of action against the other broker, his remedy being against his principal, if he was the procuring cause of the sale. *Oppenheimer v. Barnett*, 116 N. Y. S. 44.

Sec. 26. The power of attorney, its extent and its limitations.

A power of attorney to buy and sell real estate, etc., does not authorize a sale of land acquired by the grantor before he executed such power. *Greve v. Coffin*, 14 Minn. 345.

In one case it was held that the word "sell," in a power of attorney authorizing a party to sell or lease any and all real estate, etc., gives ample power to complete a sale by making a deed of conveyance to the purchaser. *Hemstreet v. Burdick*, 90 Ill. 444. Compare *Bacon v. Davis* (Cal. App. '08), 98 P. 71. Where the power granted to the agent is special, if, in an attempt to bind his principal, he varies from it, his act is void. *Mitchell v. Sproul*, 5 J. J. Marsh (Ky.), 264. An agent employed to collect rents is without authority to employ an engineer. *Crozier v. Keins*, 4 Ill. App. 564. A power of attorney confirming all sales and leases confers power to sell land. *Sulli-*

van v. Davis, 4 Cal. 291. A power of attorney to sell one-half of a tract of land imposes discretion to determine which half. *Alemanly v. Daly*, 36 Cal. 90.

A power of attorney to sell any or all of constituent's real estate, authorizes the sale of that acquired subsequently. *Fay v. Winchester*, 4 Metc. (Mass.) 513; *Burkey v. Judd*, 22 Minn. 287. A power to sell all land principal has not previously conveyed authorizes the sale of that which had been sold but not conveyed. *Mitchell v. Maupin*, 3 T. B. Mon. (Ky.), 185.

A power authorizing an agent "to grant, bargain and sell" certain lands, or any part or parcel thereof, authorizes the agent to sell on reasonable credit, to receive payment, and a payment to him was a payment to the principal, and, if circumstances rendered it favorable for the interest of his principal, he might include other valuable considerations besides money, and might sell an undivided interest in the property. *Carson v. Smith*, 5 Minn. 78.

In Illinois, a power of attorney not under seal will authorize the attorney to sell land, if it so provides, but not to convey it. *Watson v. Sherman*, 84 Ill. 263, 267. A power to sell land for the purpose of settlement is not invalidated if it afterward appear that the land was bought on speculation, and there was no fraud practiced by the purchasers. *Spofford v. Hobbs*, 29 Me. 148. A power of attorney to secure the right and title of the principal to certain lands, to employ lawyers, etc., does not confer authority to convey half the land to the lawyers for their services and for their agreeing to provide for the expense of a suit to confirm the title and in case of success to pay the attorneys a certain sum in addition. *Blum v. Robertson*, 24 Cal. 128.

A power of attorney to sell land does not include power to lease or exchange it. *Trudo v. Anderson*, 10 Mich. 357; *Lampkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Reese v. Medlock*, 27 Texas, 120. Nor does a power to sell land include power to mortgage it. *Stronghill v. Anstey*, 1 De Gex, M. & G. (Eng.) 635; *Payn v. Cooper*, 16 Beaven (Eng.), 396; *Halderby v. Spofford*, 1 Beavan (Eng.), 390; *Jeffray v. Hurst*, 49 Mich. 31; *Contant v. Servoss*, 3 Barb. (N. Y.) 128; *Russell v. Russell*, 36 N. Y. 581;

Bloomer v. Waldron, 3 Hill (N. Y.), 361; *Taylor v. Galloway*, 1 Ohio, 232.

A power to do all things concerning "my real and personal estate" gives power to make leases, with privilege of purchase. *De Rutte v. Muldrew*, 16 Cal. 505. A power to sell in lots does not sustain the sale of a portion of the land, and a conveyance thereof was held invalid. *Rice v. Tavernier*, 8 Minn. 248. Under a general power to sell property the agent may bind by a contract of sale. *Haydock v. Stewe*, 40 N. Y. 363. A deed executed under a defective power of attorney will be treated as a contract of sale. *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963. A purchaser of real estate from an agent is bound to ascertain the limits of his power to bind his principal. *Milne v. Kleb*, 14 A. 646, 810, 44 N. J. Eq. 378. See also Sec. 18. Where the instrument to be executed requires two witnesses, the power must have that number also. *Gage v. Gage*, 30 N. H. 420.

A power to purchase with particular funds invests the agent with no authority to mortgage the property to secure the purchase money, and such instrument will not bind the property. *Fraser v. McPherson*, 3 Desau. (S. C.) 393. Where one has made conveyances under a power of attorney, and the owner has sanctioned the sales by accepting the proceeds she can not contend that the power did not authorize sales. *Vaughn v. Sheridan*, 50 Mich. 155. A power of attorney to sell real estate, without restriction, authorizes a sale with covenants of general warranty. *Le Roy v. Beard*, 8 How. (U. S.) 451; *Peters v. Farnsworth*, 15 Vt. 155; *Venada v. Hopkins*, 1 J. J. Marsh. (Ky.), 285. 293; *Taggart v. Stanberry*, 2 McLean (U. S.), 543. (See Sec. 418 for cases supporting the contrary doctrine.)

A power of attorney to sell real estate may limit the time within which to perform the act; where it fixes a reasonable time for doing the act, it must be done by the attorney within a reasonable time in order to bind the principal, and a proposal of sale made under such a power must be accepted within a reasonable time from the date of the power. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

Where a broker's power contained no power of substitution he could not delegate his agency to another; hence, a contract of sale having been made by a sub-agent it was proper for the

broker to obtain a re-execution thereof. *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213. A power to sell is not violated by a contract containing provisions not in it making time of the essence of the contract. *Id.*

Plaintiff was appointed defendant's agent to sell certain land, and he sued for damages, in lieu of commissions, alleging that the completion of the sale was prevented by defendant's failure to have the land surveyed and refusal to extend the agency, the agent made a verbal sale, not binding on the purchaser on condition that the tract on survey should contain a certain number of acres. *Held*, that the defendant's failure to have the land surveyed did not excuse plaintiff's failure to make a binding sale, and did not entitle him to damages when his authority to sell expressly empowered him to have the land surveyed at the owner's expense. *Smith v. Tate*, 82 Va. 657.

Where authority is given to two or more jointly to do an act, all must concur in doing it. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.

An agent making a contract without authority or in excess thereof, binds himself. See Sec. 307b.

Sec. 27. The Attorney in fact.

An attorney in fact is one who has authority given him to act in the place and stead of him by whom he is delegated. Bacon's Abr. All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and *femes covert*, may act as attorneys for others. Bouvier's Law Dic.

Where two persons are appointed with equal authority to act for a principal, the right is not exclusive in either, but any act done by either, within the scope of his authority, will conclude the other. *Cushman v. Glover*, 11 Ill. 600; *Glenn v. Davidson*, 37 Md. 365.

Sec. 28. Assignees and assignments.

A broker who is the owner of an entire demand for commissions may assign an item of it, though he recovers on the remainder, his recovery will not bar the assignee from recovering

on the item assigned to him, though the demand is not legitimately the subject of distinct action and might have been included in the original action. *Goldshear v. Barron*, 85 N. Y. S. 395, 42 Misc. 198.

The contract of a firm to act as real estate agents for a corporation was assigned to one member of the firm, who proceeded with the business, selling the lots and rendering monthly reports in his own name; the corporation accepted the reports and proceeds of the sales, and executed checks and other papers to the assignee in his own name. *Held*, a ratification of the assignment. *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158.

Where M, having the sale of land turned it over to L, agreeing that L should be paid the commission, to which the owner consented, L was entitled to claim commissions directly, and not as assignee of M. *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775.

If a broker having charge of the property of a syndicate, makes a contract of sale of lots to a nominal purchaser to show business, and such purchaser assigns to a *bona fide* purchaser, who completes the sale, the statute of limitations will run against the broker's claim for commissions as of the date of the *bona fide* sale and not of the nominal one. *Ross v. Fickling*, 11 App. D. C. 442. Where a broker employed to sell a contract of sale of real estate at a profit succeeded, and the owners of said contract refused to assign the same, the broker was entitled to commissions. *Levy v. Trimble*, 94 N. Y. S. 3, 47 Misc. Rep. 394.

Sec. 29. Attorneys at law.

An attorney can not recover full commissions for purchasing property for another, and in addition recover an attorney's fee for defending a suit involving the right of the vendor to repudiate a sale previously made to others, as it devolved on the attorney to defeat such suit in order to earn his commissions, he having advised the purchasers that the vendor could sell. *Schomberg v. Anxier*, 101 Ky. 292, 40 S. W. 911, 19 Ky. L. R. 548. Where a client conveyed to an attorney an interest in real estate as compensation for securing a loan for him, instead

of a cash fee, the attorney acquired an equitable lien thereon. *Goad v. Hart*, 128 Cal. 197, 60 P. 761, 964.

An attorney was employed to sell real estate; the purchaser he secured was one of his clients, and was also president of a corporation of which the attorney was a director, and the contract of purchase was made for the benefit of the said corporation, the property being conveyed to it. *Held*, that the attorney sustained a relation of trust to both his client and the corporation, and could not recover commissions on such sale without proof that the purchaser had knowledge of and consented to his contract for commissions. *Nekarda v. Presberger*, 107 N. Y. S. 897, 123 App. Div. 418. Authority to agents to employ attorneys to secure the right and title of the principal to certain lands, did not authorize them to convey half the land to the attorneys for the services to be performed by them. *Blum v. Robertson*, 24 Cal. 128.

Sec. 30. Auctions and auctioneers.

A contract giving an agent the exclusive right to find a purchaser for a farm within a given time is not breached by a sale by the owner at public auction, through the medium of an auctioneer acting under his immediate direction. *Ingold v. Symonds*, 134 Iowa, 206, 111 N. W. 802. A memorandum signed by an auctioneer selling real estate describing the land sold and stating the terms of the sale, binds both buyer and seller, and is a compliance with the statute of frauds. *Garth v. Davis*, 27 Ky. L. R. 505, 85 S. W. 692.

Plaintiff was employed by defendant to advertise his property for sale at auction, to secure an auctioneer and to take charge of the sale; after plaintiff had advertised the property and secured an auctioneer, but before the day of sale, defendant sold the property privately, and thereupon agreed with plaintiff to pay him two per cent. of the price for what he had done. *Held*, that this agreement was not within the statutory requirement of a writing to entitle the broker to commissions. *Griffith v. Daly*, 56 N. J. Law (27 Vroom), 466, 29 A. 169.

CHAPTER VI.

SECTION.

- 31. Architects.
- 32. Abstracts of title.
- 33. Meeting of minds.
- 34. Executors and administrators.

SECTION.

- 35. Trusts and trustees.
- 36. Principal and agent.
- 37. Partnership.

Sec. 31. Architects.

In an action by an architect for compensation for procuring capitalists ready and willing to undertake the construction of a hotel, it was alleged that his right to compensation depended on his procuring satisfactory arrangements for the erection of a hotel on the land then owned by the defendant, that he procured the necessary capital to construct the hotel on terms agreeable to defendant, on such premises and on premises subsequently purchased by defendant. *Held*, that complaint alleged performance by the architect of his contract of employment and stated a cause of action. *Lucas v. Smith*, 98 N. Y. S. 1037, 113 App. Div. 31.

Sec. 32. Abstracts of title.

A real estate broker employed to sell land inquired whether his principal had an abstract of title, and was told by her that she saw no necessity for sending an abstract until a sale was made; on his securing a prospective purchaser and requesting that an abstract be sent, the owner forwarded an entire, complete abstract, which the broker procured to be extended to date; the sale was not consummated. *Held*, that the broker was not entitled to recover for his outlay in perfecting the abstract. *Parks v. Hogle*, 124 Iowa, 98, 99 N. W. 185. A purchaser for a tract of land has no right to impose upon the owner the obligation to furnish an abstract of title when not authorized by the contract. *Hunt v. Tuttle*, 133 Iowa, 647, 110 N. W. 1026.

Where an exchange of properties was defeated through insistence that the purchaser should furnish an abstract of title no commission was earned by the broker. *Marple v. Ives*, 111 Iowa, 602, 82 N. W. 1017.

Sec. 33. Meeting of minds.

Where a prospective purchaser insisted upon a warranty deed and the owner would only quit-claim as to that part of the conveyance which covered what was formerly a street, there was no meeting of minds, and the broker was not entitled to commissions. *Hess v. Bloch*, 107 N. Y. S. 86, 56 Misc. Rep. 480.

A broker can not recover commissions for finding a purchaser unless he brings the minds of the owner and the prospective purchaser to an agreement upon a sale, price and terms thereof, and all the details incident to a sale. *Pearce v. Ross*, 108 N. Y. S. 48, 123 App. Div. 611; *Cole v. Kosch*, 102 N. Y. S. 14, 116 App. Div. 715. See also Secs. 73, 541, *Hutter v. Kuhner*, 121 N. Y. S. 210. The same requirement applies in the case of a lease. *Tanenbaum v. Boehm*, 111 N. Y. S. 185, 126 App. Div. 731. Where a broker produced a purchaser who refused to execute a contract, there was no meeting of minds and the broker was not entitled to commissions. *Behrmann v. Marcus*, 107 N. Y. S. 12. See also Sec. 73. A broker can not recover commissions unless the principal and the person procured came to an agreement on the terms of the transaction, although the terms may be vague. *Folinsbee v. Sawyer*, 36 N. Y. S. 405, 15 Misc. 293; *Drake v. Biddinger*, 30 Ind. App. 357, 66 N. E. 56; *Garcelon v. Tibbetts*, 84 Me. 148, 24 A. 797; *Runyan v. Wilkinson*, 57 N. J. Law, 420, 31 A. 390; *Montgomery v. Knickerbocker*, 50 N. Y. S. 128, 27 App. Div. 117; *Guthman v. Meyer*, 63 N. Y. S. 971, 31 Misc. 810; *Bohner v. Lenish*, 60 N. Y. S. 543, 29 Misc. 315; *Laffler v. Friedman*, 57 N. Y. S. 281, 26 Misc. 750; *Kiam v. Turner*, 21 Tex. Civ. App. 417, 52 S. W. 1043; *Hand v. Conger*, 71 Wis. 292, 37 N. W. 235; *Barnard v. Monarch*, 33 How. Pr. (N. Y.) 440, 1 Abb. Dec. 108, 3 Keyes, 203; *Gardner v. Pierce*, 116 N. Y. S. 155; *W. P. Rae Co. v. Kane*, 116 N. Y. S. 729. See also Secs. 73, 541.

The phrase "bringing the seller and purchaser together," in

order to entitle a real estate broker to his commissions, does not necessarily mean that he must introduce them to each other, but that, if his efforts result in bringing the minds of the two to an agreement resulting in the sale and purchase of the land, then, within the meaning of the law, he has brought them together. *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207.

Sec. 34. Executors and administrators.

An admission by an executor, in an action for commissions for procuring a purchaser of testator's land, that he was the executor and trustee under a will is not sufficient to show that he was authorized to sell the land. *Guthman v. Meyer*, 63 N. Y. S. 971, 31 Misc. 810. An agreement to buy land, entered into by one of two executors for himself and his co-executor, is not binding, since the power of an executor can not be delegated. *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134.

A promise made by an administrator to a broker to compensate him for selling land, followed by a sale to a customer introduced by the broker, is a personal contract disconnected from the ownership of the land sold. *Moore v. Daiher*, 92 Mich. 402, 52 N. W. 742; *Hickman-Coleman Co. v. Leggett* (Cal. App. '09), 100 P. 1072.

Where the owner of an interest in a mine agreed to pay an agent a certain commission for selling the same, and a prospective purchaser was secured who took an option on the interest for a fixed period, the owner depositing a deed in escrow; before the expiration of the option the owner died and the deed, on the failure of the party to exercise his option, was returned to the administrator; subsequently the party who had held the option purchased the interest from the administrator for the price previously agreed upon. *Held*, that the administrator was not liable for the commission agreed upon in the contract made with the decedent. *Trickey v. Crowe*, 8 Ariz. 176, 71 P. 965; affirmed 204, U. S. 228; *Crow v. Harmon*, 204 U. S. 241; affirming *Harmon v. Crowe*, 71 P. 1125; *Enyeart v. Figard*, 38 Pa. Super. Ct. 488.

Where an administrator authorized a broker to sell decedent's land, and he received the required deposit subject to return if the sale was not completed, the relation of principal and agent

was established between the parties and not that of vendor and purchaser, and therefore the purchaser could recover the deposit from the administrator, on a breach of the specified conditions, and was not required to sue the broker. *Melone v. Rufino*, 129 Cal. 514, 62 P. 93, 79 Am. St. R. 127.

Where a broker agreed with an owner of land to sell it, and that all above a certain price should be divided between them, and advised her, after a certain time, to sell below the price named, on the ground that the land was not worth more, and effected a sale after the death of the owner, for her executor, at a price which left nothing to be divided under his agreement with the decedent, a claim against the executor for commissions could not be allowed. *In re French's Est.*, 101 N. Y. S. 734, 51 Misc. R. 457.

Under a statute requiring that an agreement authorizing an agent to sell real estate for a commission must be in writing, a real estate agent can not recover from executors, as individuals, commissions for selling property, when the contract produced consists of letters from one of the executors only, which show that he was acting as executor and not individually. *Perkins v. Cooper* (Cal. Supreme '90), 24 P. 377.

Where the will gave the executor power to sell land, and the executor entered into a contract authorizing an agent to sell a portion of the land, promising him commissions therefor, and the agent secured a purchaser to whom a conveyance was executed, the agent can maintain an action against the executor as such for his services. *Ingham v. Ryan* (Cal. App. '03), 71 P. 899.

Where legacies are charged on real estate and the necessity for a sale of the land is clear, commissions of a broker upon such sales should be allowed as a necessary expense of administration, on appraisal of the estate for the transfer tax. *In re Rothschild's Estate*. 118 N. Y. S. 654, 63 Misc. Rep. 615.

Sec. 35. Trusts and Trustees.

Defendant brokers, being authorized by plaintiff to sell land for \$2,300, intrusted the matter to G, an employe, who persuaded one S to take the land for \$2,300, promising that defendants would raise the money for him; defendants failed to

raise the money, whereupon S begged G to find some one to take the contract off his hands and save him the \$100 paid to plaintiff; defendants having then disposed of part of the land for \$600, H, another employe of defendants, with knowledge of the facts, agreed to take over the contract, S to take another part of the land for \$600, counting in his \$100 paid; these two sales for \$600 each amounted to half of the land; plaintiff not knowing that H was an employe of defendants gave him a deed and received from him \$2,300, less \$200 commissions paid to defendants; H later sold the rest of the land for \$2,100. *Held*, that defendants and H were guilty of a legal fraud on plaintiff, and must, as trustees, account to him for the profits realized. *Powers v. Black*, 159 Pa. St. 153, 28 A. 133.

An agent who takes a conveyance in his own name will be charged as holding it in trust for his principal. *Sweet v. Jaccocks*, 6 Paige (N. Y.), 355; *Church v. Sterling*, 16 Conn. 388; *Pinnock v. Clough*, 16 Vt. 500; *Switzer v. Skiles*, 3 Gilm. (Ill.) 529; *Follansbee v. Kilbreath*, 17 Ill. 522. Compare *1st Bank v. Bissell*, 2 McCrary (U. S.), 73.

A mortgage note was given to a real estate broker by the mortgagee for collection, and the mortgagor also placed the land in said broker's hands for private sale; a private sale which the broker attempted to make having failed, on account of a defect in the title, and the mortgagor having ceased to trust or rely on the broker, the latter had the property sold under a power in the mortgage, and it was bought by a third person not in privity with the broker. *Held*, that the broker was not guilty of a breach of trust. *Ritchie v. Judd*, 137 Ill. 453, 27 N. E. 682. An agent who has invested his principal's money in land and taken the title in his own name, will not be allowed to set up the statute of frauds against the enforcement of the trust, on the ground that the agency was without written authority. *Firestone v. Firestone*, 49 Ala. 128.

A trustee for the sale of assets for the payment of debts who purchased them himself by taking undue advantage of the confidence reposed in him by the plaintiff, and before the completion of the contract sold them at a highly advanced price, was decreed to be a trustee for the original vendor as to the sums produced by such second sale. *Fox v. Mackreth*, 2 Brown Ch.

(Eng.), 400. Where plaintiff employed defendant as his agent to purchase certain property, and defendant falsely represented to the seller that it was necessary that he should take the title, and wrongfully procured the deed to be made in his own name, he held title as a trustee *ex maleficio*, and was liable at the suit of the plaintiff to be compelled to convey. *Harrison v. Craven*, 188 Mo. 590, 87 S. W. 962.

A co-agent, under a power to sell, is not bound by an authorized option not given or ratified by himself, and if he purchases the land himself can not be held as a trustee for a claimant under the option. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. R. 977. Where real estate was transferred to a trustee to hold or convey the same as he thought best, items paid real estate agents and others as commissions on sales of real estate, which were shown to be reasonable commissions for the services rendered, were properly charged against the trust estate. *Babbitt v. Fidelity Trust Co.*, 70 N. J. Eq. 651, 66 A. 1076.

If one who is clearly the agent for another to purchase property repudiates the agency and acts for himself, using his own funds, he can not be declared a trustee for his principal, although the latter may have been misled by the conduct of the former. *First Bank v. Bissell*, 2 McCrary (U. S.), 73. Compare *Hutchison v. Hutchison*, 4 Desau. (S. C.), 77. In the absence of a specific agreement therefor, a broker who procures a loan for the benefit of a trust estate has no lien on such estate for his commission, his remedy being against the trustee personally. *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435.

Sec. 36. Principal and agent.

The relation of principal and agent arises out of contract. T and W entered into an agreement with O to sell real estate for him within a certain time, and before the expiration of the time O requested the return of the agreement: W offered to purchase the land himself rather than lose the sale. *Held*, that the offer was not equivalent to a sale, the relation between the parties was that of principal and agent, and could not, without O's consent, be changed into that of vendor and purchaser. *Tower v. O'Neil*, 66 Pa. St. 332. A broker who asks and ob-

tains from the owner the price of land, that alone does not establish the relation of principal and agent; nor a contract of employment. *Stephens v. Bailey*, 149 Ala. 256, 42 S. 740; *Denton v. Abrams*, 105 N. Y. S. 2, 120 App. Div. 593. Nor does one who takes an option to purchase real estate at a stated price sustain the relation of agent for the vendor to negotiate its sale. *Southack v. Lane*, 52 N. Y. S. 687, 23 Misc. 515, r. on o. gr. 65 N. Y. S. 629, 32 Misc. 141; *Davenport v. Corbett*, 98 N. Y. S. 403, 112 App. Div. 382.

An option and title bond taken by an agent to insure the carrying of a sale into effect, if made, does not change the relation of principal and agent, and the principal remains liable for the fraud of the agent. *Alger v. Anderson*, 78 Fed. 729.

The rule that a sale by a party direct, leaves the broker's right to commissions intact, where the latter has furnished the purchaser, and has thus been the procuring cause of the sale, presupposes a relationship of principal and agent, and hence, where that relationship does not exist, the rule does not apply. *Pecos Valley Imp. Co. v. Cecil* (N. M. Sup. '09), 99 P. 695.

Sec. 37. Partnership.

A contract whereby the obligors bind themselves to contribute certain moneys toward the purchase of land, does not constitute them partners so as to authorize one to select a trustee to take the title and execute notes for the purchase price and a deed of trust as security therefor. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397; *Fisk v. Waite* (Or. Sup. '09), 99 P. 283. A real estate agent can not be permitted to form an arrangement with a third party to purchase the land of his principal as partners; he can not assume a position where he can speculate off of his principal. *Reardon v. Washburn*, 59 Ill. App. 161.

The fact that the partner of a purchaser produced by a real estate broker, unknown to him, attempted to buy direct from the owner and that the owner refused to sell should not deprive the broker of his commissions on a sale made to his customer, where he had no knowledge of the partner's negotiations, and the broker acted in good faith. *Hartford v. McGillicuddy*, 103 Me. 224, 68 A. 860. Where a real estate agent has a written contract with the owner of land to put it upon the market, ad-

vertise and sell the same, having for his interest only a share in the surplus profits arising from the proceeds of the sale of the land. *Held*, that the contract was one of agency and not of partnership. *Durkee v. Gunn*, 41 Kan. 496, 21 P. 637.

Where a firm of two members contracted to manage and sell the lots of a corporation at a town other than that at which the partners resided, the fact that the business was carried on in the town where the lots were located by only one of the partners was not a breach of the contract. *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158.

The testimony of one of two brokers that the firm never received the alleged letter revoking their authority is competent to show that neither he nor his partner received it. *Sayre v. Wilson*, 86 Ala. 151, 5 S. 157.

Authority conferred on a partnership to sell real estate is terminated on the dissolution of the partnership. *Larson v. Neuman* (N. D. Sup. '09), 121 N. W. 202; Mechem on Ag. Sec. 221. Compare Sec. 637b.

The illegality of a real estate firm agreement arising from the fact that it contemplated the representation by the firm of both parties in the transactions does not affect transactions wherein the firm represented but one party and earned commissions lawfully, and as to such commissions a partner can not withhold from his copartner his share, on the ground that the firm conducted other illegal transactions. *Fryer v. Harker* (Iowa Sup. '09), 121 N. W. 526.

CHAPTER VII.

SECTION.

38. Corporations.

39. Husband and wife.

SECTION.

40. The vendor.

41. The vendee or purchaser.

Sec. 38. Corporations.

Where defendants, who were two of the officers of a corporation, employed plaintiff to sell the corporate assets for a certain price, and he procured a purchaser, ready, willing and able to purchase at that price, it was no defense to an action brought to recover commissions that plaintiff knew that defendants did not own a majority of the stock of the corporation, and that plaintiff did not procure a ratification of the transaction by the stockholders. *Norman v. Hopper*, 38 Wash. 415, 80 P. 551; *Lawson v. Black Diamond Coal Mining Co.* (Wash. Sup. '09), 102 P. 759.

In an action by a real estate broker for commissions, evidence held insufficient to show that the share holders of the association which owned the real estate ever authorized the officers thereof to list the real estate with plaintiff for sale, or ratified the same. *Spottswood v. Morris*, 12 Idaho, 360, 85 P. 1094, 6 L. R. A. (N. S.) 665.

The treasurer of a charitable corporation, without authority, took railroad bonds registered in the name of the corporation to a broker for sale, the broker refused to handle the bonds unless they were made transferable to bearer by the legal transfer agent of the railroad company; the transfer agent required from the corporation a copy of a resolution of its directors authorizing the transfer and a power of attorney to make it; the treasurer drew up a resolution of authority and forged thereto the signatures of the officers and the seal of the corporation, and also forged a power of attorney; the transfer agent thereupon, in good faith, made the transfer and the broker

sold the bonds. *Held*, that the broker and the railroad company were liable to the corporation for the value of the bonds, though both acted in good faith, and the corporation may recover from either. *Jennie Clarkson Home for Children v. R. R. Co.*, 87 N. Y. S. 348, 1137, 1138, 92 App. Div. 491, 618, 617, 74 N. E. 571, 1118, 182 N. Y. 47, 507, 70 L. R. A. 787.

Under the laws of Pennsylvania a corporation, in order to lawfully engage in the business of buying and selling real estate for others, must pay a license tax or fee to the commonwealth. *Commonwealth v. Sam. W. Black*, 34 Pa. Super. Ct. 431. A broker sustaining a relation of trust to a purchasing corporation could not recover a commission for effecting a sale of real estate to it, without proof that the purchaser had knowledge of and consented to his contract for commissions. *Steel v. Lawyer*, 47 Wash. 266, 91 P. 958; *Nekarda v. Presberger*, 107 N. Y. S. 897, 123 App. Div. 418.

A person dealing with an officer of a corporation in a matter concerning which the corporation has power to act is not bound to know the limits of the officer's authority to act for the corporation. *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128. A written contract may be entered into by a corporation, without formal vote or written entry thereof, by its directors, where they are all present and assent thereto. *Indiana Bermudez Asp. Co. v. Robinson*, 29 Ind. App. 59, 63 N. E. 797.

A corporation organized for the purpose of buying land and selling it out in lots, is not bound by a contract between the president and the secretary by which the latter was to have a certain commission on "each lot sold for the company," defendant is liable only for a reasonable commission on the amount actually received from such sales, the officers making the contract both being directors. *Louisville Bdg. Assn. v. Hegan*, 20 Ky. L. R. 1629, 49 S. W. 796. Where, by a contract in regard to the sale of property, a broker arranged with all the parties that his compensation should be paid in certain stock of a company to be formed by him and others to buy the land, he can not hold the vendors responsible for such compensation. *Bowles v. Allen*, 21 S. E. (Va.) 665. Where defendant in his negotiations with a broker did not purport to bind himself individually, but purported to bind a corporation of which he was the pres-

ident, no recovery can be had against him for commissions. *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128.

The fact that a broker employed to effect a sale is a director in the corporation which he procures to buy the property does not prevent him from recovering commissions, where the person who practically owns the capital stock of the corporation consents to the transaction, the question of fair dealing being submitted to the jury. *Goldshen v. Barrow*, 85 N. Y. S. 395, 42 Misc. 198. Compare *Investment Co. v. Ater*, 49 Wash. 446, 95 P. 1017. In an action brought by a broker against a corporation to recover commissions, he must establish his employment by one authorized to bind the corporation, or prove a subsequent knowledge of, adoption and ratification of his employment by the corporation. *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269; *Cohn v. James McCreary Realty Cor.*, 92 N. Y. S. 143, 102 App. Div. 611.

Sec. 39. Husband and wife.

One who negotiates a sale of land belonging to a husband and wife can not recover of the husband compensation for selling the wife's interest in the land, unless the husband agree to pay therefor. *Spängeman v. Palestine Bldg. Assn.*, 60 N. J. L. 357, 37 A. 723; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593. It does not follow that because the husband has charge of the wife's property and has authority to sell the same, that he is authorized to employ another to procure a purchaser. *Groscup v. Downey*, 105 Md. 273, 65 A. 930. See also Sec. 1022.

A husband undertaking to be bound for the commissions of the broker for effecting a sale of real estate for his wife, is personally bound whether he discloses his agency for his wife or not. *Jarvis v. Schaefer*, 105 N. Y. 289, 11 N. E. 634.

In an action for commissions on a sale of land belonging to defendant, it appeared that plaintiff had sold other land for defendant and her husband several years before, and that this property was left in plaintiff's hand to sell for \$50,000, and that the price was raised until finally plaintiff obtained an offer of \$65,000, which was reported to defendant and her husband, and which each agreed to accept—the husband got an abstract of title and the purchaser placed checks with the plain-

tiff to bind the bargain—but when the time came for closing the sale defendant declined to execute the deed. *Held*, that there was evidence to go to the jury as to the plaintiff's employment by the defendant or by the husband as her agent. *Codd v. Seitz*, 94 Mich. 191, 53 N. W. 1057; *Sims v. Rockwell*, 156 Mass. 372, 31 N. E. 484. The refusal of the wife to join with the husband in a deed of conveyance does not protect the principal from liability for the commission earned by the broker in procuring a purchaser. *Tebo v. Mitchell*, 5 Pennewill (Del.), 356, 63 A. 327; *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301; *Goldberg v. Gelles*, 68 N. Y. S. 400, 33 Misc. 797; *Clapp v. Hughes*, 1 Phila. (Pa.) 382.

A man is not bound by a contract for the sale of his land made by a broker in accordance with letters and a telegram sent by his wife, who, although attending to his correspondence and the renting of his property, had no written authority to contract for him, and who sent the letters and telegram in question without informing him of their contents. *Edwards v. Tyler*, 141 Ill. 454, 31 N. E. 312. To sustain an action for commissions a broker must show a direct employment by the principal, or a direct authority for him to treat with the agent of the principal; if the wife for her husband be relied upon special authority or ratification must be shown. *Harper v. Goodall*, 62 How. Pr. (N. Y.) 288, 10 Abb. N. Cas. 161; *Harrell v. Veith*, 13 N. Y. St. 738. The same rule applies in the case of a wife's property. *Hurd v. Lee*, 116 N. Y. S. 445. Where one employs a real estate broker to find a buyer for land, which he occupies with his wife as a homestead, and the broker produces a purchaser ready and willing to take the property, the broker's claim for compensation is not defeated by the fact that the sale is prevented by the refusal of the wife to execute a conveyance. *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1178; *Staley v. Huffard*, 73 Kan. 686, 85 P. 763; *Carey v. Whitman*, 110 Mo. App. 204, 84 S. W. 1131; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Kepner v. Ford* (N. D. Sup. '07), 111 N. W. 619.

The same is true of the sale of other property in which the wife refuses to relinquish her right of dower. *Cook v. Fryer*, 3 Ky. L. R. (abst.) 612. Also, where the wife refused to sign

the deed unless given half the proceeds of sale, with which demand the husband would not comply. *Marlin v. Sipprell*, 93 Minn. 271, 101 N. W. 169. The defendant, without authority from his wife, employed plaintiff as a broker to sell her real estate, but the written authorization to offer the property for sale was not signed by the wife or her attorney in fact, as required by the statute. *Held*, that as plaintiff could not have recovered against the wife by virtue of such invalid writing, even if defendant had had authority to place the property for sale, defendant was not individually liable for the breach of an implied warranty of authority. *Hochbaum v. Rotter*, 101 N. Y. S. 531.

A married woman, under the statutes of Indiana, has power to bind herself for the payment of a broker's services rendered in the sale of her real estate. *Isphering v. Wolf*, 36 Ind. App. 250, 75 N. E. 598. A married woman, without separate estate, who in 1892 bought a farm, took title to it, enjoyed its fruits for seven years, and then sold it and received the purchase money, can not escape liability upon her written promise to pay for the land and the personal property which was appended thereto, on the ground that the obligation was not binding upon her, and that, without any offer to return either the property or the proceeds of the sale. *Crosby v. Watters*, 28 Pa. Super. Ct. 559.

Sec. 40. The vendor.

Where a broker is employed to sell real estate he is the agent of the vendor. *Gough v. Loomis*, 123 Iowa, 642, 99 N. W. 295; *Earp v. Cummins*, 54 Pa. St. 394. If the vendor secretly pays a commission to the purchaser's broker, the purchaser has a right of action against the vendor to recover the amount thereof. *Grant v. Gold Ex. Syn.* 1 Q. B. (Eng.) 233, 69 L. J. Q. B. 150, 82 L. T. R. N. S. 5, 48 Weekly Rep. 280. See Sec. 401.

Where, through the misrepresentation of the vendor, innocently repeated by the broker to the prospective purchaser, and the falsity of which, being discovered, defeated the sale, the broker was held not entitled to his commission, for had it not been for the misrepresentation the prospective purchaser would not have entered into the agreement. *Crockett v. Grayson*, 98

Va. 354, 36 S. E. 477. *Contra, Goodman v. Hess*, 107 N. Y. S. 112, 56 Misc. 482. Where it appears that a real estate agent employed to sell land had acted in similar transactions for the vendor, that after making the sale the agent was active in assisting the vendee's agent in clearing up some defects in the title, that he filled up a deed and carried it to the vendor to sign, and then took it away, without objection on the part of the vendor, delivered it to the vendee's agent, and received the purchase money, which he appropriated to his own use, and the vendor subsequently admitted to disinterested persons that she had authorized the agent to collect the money, the loss thereof must fall on the vendor, under whose authority the agent acted. *Frank v. Levy*, 10 Ohio Cir. Ct. R. 554. Compare *Rhode v. Marquis*, 135 Mich. 48, 97 N. W. 53. Where a broker acts openly and himself buys the property, the vendor accepting him as such, he is entitled to recover commissions for the sale, upon clear proof that such was the understanding of the vendor at the time of the sale. *Grant v. Hardy*, 33 Wis. 668.

A real estate agent employed to buy certain property at a certain price, does not forfeit the commission which the purchaser agreed to pay him, because he secured another commission from the vendor after the vendor had accepted the terms offered. *Jones v. Henry*, 36 N. Y. S. 483, 15 Misc. 151. A contract to pay real estate agents commissions for their services in endeavoring to effect a sale, entitles the agents to commissions if they produce a purchaser to whom the vendor in fact sells. *Bowe v. Gage*, 127 Wis. 245, 106 N. W. 1074, 115 Am. St. R. 1010. An innocent vendor can not be sued in tort for the fraud of his agent in effecting a sale; in such case the vendee may rescind the contract and reclaim the money paid, and if not repaid, may sue the vendor in assumpsit for it, or he may sue the agent for the deceit. *Kennedy v. McKay*, 43 N. J. L. 288.

Where a broker procured a purchaser for the land sold by taking another piece of land for a part of the price, and these terms were accepted by the vendor, the transaction was a sale, and entitled the broker to the performance of the vendor's contract to allow him all over a specified amount that he could get for the land. *Ullman v. Land*, 37 Tex. Civ. App. 422, 84

S. W. 294; *Thornton v. Woody* (Tex. Civ. App. '93), 24 S. W. 331. See also Secs. 121, 164. A purchaser contracted to buy land and agreed to pay one-third cash; the sale was not made. *Held*, that the broker, in order to recover his commissions, was not required to prove that the purchaser was of such financial responsibility that his notes for the balance would have been good, irrespective of a vendor's lien, the contract employing the broker not stipulating that the purchaser should have such financial responsibility. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627. A vendor may, if he is doubtful of the proposed vendee's ability to carry out his contract of purchase, accept the contract conditionally, and agree to sell, provided the purchaser proves able to perform its condition. *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326. A broker for a purchaser of real estate can not call upon his employer to go to the place of business of the vendor, and there make the contract or negotiate for its terms. *Logan v. McMullen*, 4 Cal. App. 154, 87 P. 285.

Sec. 41. The vendee or purchaser.

Where a broker is employed to buy real estate he is the agent of the vendee. *Marsh v. Buchan*, 46 N. J. Eq. 595, 22 A. 128. Where a vendor under a contract for the sale of lands, which is within the statute of frauds because not in writing, is nevertheless willing and offers to perform on his part, but the vendee refuses to fulfill and repudiates the contract, the latter is not entitled to recover any installments of purchase money paid. *McKinne v. Harvie*, 38 Minn. 18, 35 N. W. 668. Where an agent is authorized to sell and convey lands, and enters into a contract with the vendee, his receipts bind the principal. *Peck v. Harriott*, 6 Serg. & R. (Pa.) 146.

The owner of land authorized a broker to make a sale thereof, "commissions to be paid out of payments as made," and a letter in setting forth the terms of the sale provided that on default by the purchaser all prior payments should be forfeited and neither party have any claims on the other; the broker found a purchaser, who gave a deed of trust to secure the payments and subsequently defaulted; thereafter, the vendor released the vendee from his obligations and conveyed to another,

and the broker sued for commissions on the entire price. *Held*, that the contract between the parties did not entitle the broker to commissions except on those payments actually made by the vendee. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871. Compare *Seymour v. St. Luke's Hospital*, 50 N. Y. S. 989, 28 App. Div. 119.

A vendee, defrauded by the agent of the vendor, may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in assumpsit for it, or he may sue the agent for the deceit. *Kennedy v. McKay*, 43 N. J. L. 288; *Farris v. Wilder* (Tex. Civ. App. '09), 115 S. W. 645. Where the vendee knows that the vendor is a broker, and though there is reason to believe he is selling the property for some principal, yet if he does not see fit to bind his principal by the form of the contract made, by contracting in his own name, he may become liable as a vendor. *Scaling v. Knollin*, 94 Ill. App. 443. A broker to purchase real estate for a vendee can not call on his principal to go to the place of business of the vendor to make the contract or negotiate as to its terms. *Logan v. McMullen*, 4 Cal. App. 154, 87 P. 285. If the contract requires the price to be paid in cash, the purchaser must have the cash at the time available for the purpose. *Neiderlander v. Starr*, 50 Kan. 766, 32 P. 359; *Watters v. Dancy* (S. D. Sup. '09), 122 N. W. 430. It is not sufficient that the purchaser has property from which the price might be realized by suit. *Dent v. Powell*, 93 Iowa, 711, 61 N. W. 1043.

If at the time of signing the contract the purchaser is ready to make the payment then due, the broker is not required to show that he has funds available to make the final payment. *Levy v. Ruff*, 23 N. Y. S. 1002, 4 Misc. 180. Mere insolvency of the purchaser does not defeat the broker's right to commissions where the sale contemplated being secured by a bond and deed of trust, which the purchaser is prepared to deliver. *Ross v. Fickling*, 11 App. Cas. (D. C.) 442. The fact that the purchaser procured was representing a concealed principal does not affect the broker's right to commissions, if the produced purchaser was able, ready and willing to buy on the terms authorized by the principal and no binding written contract of sale is required. *Gellott v. Ridge*, 117 Mo. 553, 23 S. W. 882.

Where land is intrusted to a broker to sell and collect the purchase money, a purchaser is entitled to credit for payments made to the broker before the receipt by the purchaser of a notice of the withdrawal of the broker's authority. *Meeker v. Mannin*, 162 Ill. 203, 44 N. E. 397; *Lawler v. Armstrong* (Wash. Sup. '09), 102 P. 775. A purchaser who makes a parol contract and repudiates it before it is reduced to writing, bars the right of the broker to recover commissions. *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572; *Sloman v. Bodwell*, 24 Neb. 790, 40 N. W. 321. A purchaser buying real estate of an agent must, at his peril, ascertain the extent of the agent's powers. *Milne v. Kleb*, 14 A. 646, 810, 44 N. J. Eq. 378. See also Sec. 18. After concluding the contract of sale a broker may become the agent of the purchaser, when he puts money into the hands of said agent to pay for the land. *Small v. Collins*, 6 Houst. (Del.) 273.

A complaint in an action to recover a real estate broker's commission is not demurrable because of failure to allege that the agent disclosed to defendant the identity of the purchaser, where it does not appear that he refused to do so, or that the defendant made demand therefor, or suffered any injury from the fact of concealment. *Bertleson v. Hoffman*, 35 Wash. 459, 77 P. 801. A broker who conceals the name of the real purchaser, and puts forward a fictitious purchaser, commits a legal fraud and can not recover commissions. *Pratt v. Patterson*, 12 Phila. (Pa.) 460, 112 Pa. St. 475. An owner of real estate who offers to pay a certain sum to another if he finds a purchaser at a named price, may, nevertheless, sell the property himself, at any time before the other has acted upon the offer and secured a purchaser, and securing a party who will purchase on different terms from those proposed by the owner in his offer is not securing a purchaser within the meaning of the contract so as to entitle the broker to a commission. *Darrow v. Harlow*, 21 Wis. 306.

A land agent is not entitled to commissions or compensation for procuring a purchaser of a plantation, when it is shown that the intended purchaser declined to complete the contract, without fault or negligence on the part of the principal, on account of a *supposed* defect in the title. *Blankenship v. Ryer-*

son, 50 Ala. 426. Where a real estate agent, for an agreed compensation, undertakes to find a purchaser satisfactory to the owner, he alone has the right to determine the consideration for which he will sell and the details governing the payments. *Kilham v. Wilson*, 112 Fed. 565, 50 C. C. A. 108.

An agreement between the owner of real estate and an agent whereby the latter was appointed to collect rents, make necessary improvements, keep the property insured, pay the taxes and the expenses that might become necessary with a view to procuring purchasers, and to receive for compensation a specified per cent. of the amount collected, did not constitute him an agent with authority to procure a purchaser of the property. *Heim v. Ashton*, 121 Iowa, 265, 96 N. W. 745.

A contract made by a broker to procure, for a compensation, certain property for a purchaser, is not within the statute for offering real estate for sale, requiring that the broker should have written authority from the owner of the property. *Friedman v. Buitker*, 91 N. Y. S. 896, 45 Misc. 178.

Where a land-owner employed the plaintiff to find a purchaser on terms whereby a certain cash payment was to be made and a mortgage given, and on producing the proposed purchaser the plaintiff offered to pay the whole of the purchase money, if the land-owner was not satisfied with the purchaser's ability to make the deferred payments when they fell due, it was held that such offer did not remove the objection of inability of the purchaser to perform the contract, as it amounted to a proposal to vary the terms of the proposed sale. *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228. Compare *Ricke v. Post*, 110 N. Y. S. 79, 125 App. Div. 607.

So, where a broker sought to recover commissions for finding a purchaser for defendant's real estate, a showing on the part of plaintiff that he produced a person willing to take the property at defendant's price, on condition that the plaintiff furnished or procured the necessary money, and that plaintiff had promise of a loan to enable him to do so, did not show performance on the part of plaintiff. *McCune v. Badger*, 126 Wis. 186, 105 N. W. 667.

Where a broker made active efforts to effect a purchase for his employer, but another broker first procured a satisfactory

offer of sale, the first broker was not entitled to any commissions. *Friedman v. Polstein*, 97 N. Y. S. 1032, 49 Misc. 644. In the absence of a special contract a broker is not entitled to a commission on merely bringing a purchaser, who was ready, willing and able to pay the price demanded, where no sale was made, because of a disagreement as to when the transfer should take place. *Haase v. Schneider*, 98 N. Y. S. 587, 112 App. Div. 336. See also Sec. 33.

A real estate agent does not produce purchasers willing to execute the contract on the terms prescribed so as to be entitled to a commission, where they insist upon more onerous terms than those originally agreed upon, and on denial thereof refuse to buy. *Weiss v. Robinson*, 98 N. Y. S. 429, 112 App. Div. 276. See also Sec. 33.

In an action by a broker for commissions for procuring a purchaser, it appeared that the person procured by the broker entered into a contract with the owner which stipulated for a sale of the real estate for a specified sum and two mortgages, and required the closing of the contract at a subsequent date; the parties failed to close the contract because of the existence of a third mortgage on the premises. *Held*, that the broker was not entitled to commissions; the person procured by him having no right to refuse to enter into a contract for the purchase of the property subject to two mortgages only, where the owner was able to perform the contract when the time for the passing of the title arrived. *Shapiro v. Nadler*, 99 N. Y. S. 879, 51 Misc. 13. See also Sec. 33.

Where a broker was employed to procure a purchaser, or one willing to exchange properties, his contract was performed when he procured a purchaser able and willing to purchase or exchange, and the fact that the broker made material misrepresentations as to the property exchanged for his client's was no bar to his recovery of his commissions, as the agent performed his contract when he brought the parties together, and they, themselves, concluded the trade. *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594. See Sec. 475. A broker employed to sell land on commission has a right to give a part of the commissions to the purchaser. *Stephens v. Tomlinson* (Tex. Civ. App. '05), 88 S. W. 304.

Where the plaintiff, in an action for the breach of a contract to sell real estate for the purchase of which he entered into a contract with the agent, knew, as did also the agent, the terms on which the defendant would sell, but chose to enter into a contract contrary thereto, he is not entitled to recover. *Fleming v. Burke*, 122 Iowa, 433, 98 N. W. 288. See also Sec. 307. Where a real estate agent claims compensation for securing the attendance of a purchaser at a public land sale, he must at least show that he had some effect upon the purchaser's attendance. *Perkins v. Underhill*, 103 N. Y. S. 25, 118 App. Div. 170.

In Nebraska, to entitle a broker to recover on a purchase of real estate, it is necessary that he procure a valid conveyance of the real estate or an enforceable contract for a sale. *Bolton v. Coburn*, 78 Neb. 731, 111 N. W. 780, 782. Where the owner of property employed a real estate broker to find a purchaser, the mere fact that the prospective purchaser found by him afterward notified him that she did not intend to purchase did not deprive him of his right to compensation, where she actually purchased the property within two or three months thereafter. *Groscup v. Downey*, 105 Md. 273, 65 A. 930. Compare *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157.

CHAPTER VIII.

SECTION.

42. The owner.

43. Covenants.

44. Conditional contracts.

45. Condition precedent to taking effect.

SECTION.

46. Death, and its effect on contracts.

47. Approval of principal.

48. Abbreviations.

Sec. 42. The owner.

Where a non-resident owner employs a non-resident agent to sell real estate, the agent is authorized to employ a sub-agent. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574. An owner writing to his broker after the time given to sell had expired, directing him to sell, if possible, within the next thirty days, if he could get a certain sum net, extended the term of employment. *Johnson v. Wright*, 124 Iowa, 61, 99 N. W. 103. See also Sec. 560. Where an owner informed his broker that it would not be necessary for him to produce the purchaser to reduce the contract to writing, further steps in the matter by the broker were unnecessary. *Gerhart v. Peck*, 42 Mo. App. 644. Where the owner of a building employed brokers to obtain tenants, and authorized the brokers to conduct their customers into the building, he was liable for injuries sustained by a customer while examining the building in company with the brokers and due to their negligence. *Boyd v. U. S. Mtge., etc., Co.*, 94 N. Y. App. Div. 413, 88 S. 289.

The mere erection of a sign on property by real estate agents as for sale by them, the name of the owner not being stated, does not hold them out as agents to the public, and as having general authority to bind the owner by a contract of sale. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35. If a letter amounts to a request to the person addressed to procure a purchaser for land, when the writer was part owner of the land and had full authority to act for the other owners and the person addressed

acted upon the letter and did procure a purchaser satisfactory to the owner, and they concluded to sell the land to such purchaser, the owners were legally liable to pay the commissions promised. *Fisk v. Henerie*, 13 Oregon, 156, 9 P. 322. If any of the terms of sale as to payment, abstracts or time are unsatisfactory to the owner, he should object on that ground, and not refuse absolutely to sell. *Weaver v. Snow*, 60 Ill. App. 624.

Where a contract ran for one year, and provided that if plaintiff, a real estate broker, effected a sale of defendant's property, he was to receive a certain commission, and in case a sale was made without his aid or the property was withdrawn from sale, one-half commissions. *Held*, that a lease for five years made by defendant, with the exclusive privilege to the lessee of purchasing at a fixed price at any time before the expiration of the lease, was a sale within the meaning of the contract, and entitled plaintiff to one-half of the commissions. *Rucker v. Hall*, 105 Cal. 425, 38 P. 962. Compare Sec. 19. Where a land-owner, who has engaged a real estate agent to sell land at a certain price, is forced to join with a joint owner to effect a sale, and sell at a reduced price, the agent is not entitled to commissions. *Buhl v. Noe*, 51 Ill. App. 622. The owner of land authorized a broker to sell it and afterwards sold it himself, the broker then found a purchaser and sued for his commissions. *Held*, that he could recover only on the ground of the owner's breach of the contract, and not on the ground that he had fulfilled his contract as broker, for the owner still had the power to sell the land himself. *Metzer v. Wyatt*, 41 Ill. App. 487. See authorities that a sale puts an end to the contract with the broker, Sec. 15.

One who purchases real estate from a non-resident owner, through a real estate broker, is bound to ascertain, not only the terms of his authority, but also the correspondence by which such authority was obtained. *Merritt v. Wassenich*, 49 Fed. 785; *Sullivant v. Jahren*, 71 Kan. 127, 79 P. 1071. Where certain land stood in the name of a third party, and the real owner procured a broker to sell the land who made false representations as to its value, and the nominal owner of the land held title to a bond and mortgage given in part payment of the price. *Held*, that the fraud of the real

owner and the broker was imputable to the person in whose name they acted. *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, affirming 20 N. Y. S. 31, 65 Hun, 621.

If one employed to manage property for its owner is empowered to make such repairs only as are necessary to preserve and protect the property from ordinary wear and tear, he can not charge the owner with the expense of permanent improvements, as of rebuilding after a fire. *Beekman v. Wilson*, 61 Cal. 335. An exclusive agency to sell merely prohibits the appointment of another agent for the sale of the property, but does not prevent the owner himself from making a sale. *Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569. In the case of an agency to sell real estate, the exclusive right to sell not being given, the owner himself still has the right to make a sale independent of the agent, and in such case will not be liable to the agent for commissions, unless he sells to a purchaser procured by the agent. *Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569; *Hungerford v. Hicks*, 39 Conn. 259; *Gilbert v. Coons*, 37 Ill. App. 448; *Darrow v. Harlow*, 21 Wis. 306; *Tracey v. Radeki* (Iowa Sup. '09), 119 N. W. 525.

The owner of property who sells it himself within the period which he has given to a broker to make a sale thereof, although the broker has done nothing toward facilitating the sale of the property, and the contract is unsupported by a valuable consideration, must pay the latter the commissions agreed on. *Carle v. Parent* (Montreal Law Reports), 5 Q. B. 451; *Campbell v. Thomas*, 87 Cal. 428; *Gregory v. Bonney*, 135 Cal. 589, 67 P. 1038; *Lipscomb v. Cole*, 81 Mo. App. 53; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Harrel v. Zimplemen*, 66 Tex. 292, 17 S. W. 478; *Sechrist v. Atkinson*, 31 App. (D. C.) 1.

In a New York case of a similar exclusive character, where the agent performed no services in relation to the sale of the property on which he asked commissions, his claim was denied on the ground of want of consideration. *Wright v. Fulling*, 93 N. Y. S. 228, 104 App. Div. 49. Where defendants authorized plaintiff to sell certain real estate for them at any time within a year, the contract being supported by a valuable consideration, and agreed to pay a commission if a sale should be effected

in any way during that time, and the land was sold by the defendants within the year, plaintiff to recover a commission need not show that he produced or could have produced a purchaser. *Crane v. McCormick*, 92 Cal. 176, 28 P. 222.

The owner of property, after negotiating with J with reference to a sale, gave plaintiff a written authority to sell the property for a specified price, and plaintiff then negotiated with J, who made an offer of a less sum, which was rejected by the owner, thereafter the owner revoked the authority, and subsequently, in pursuance of the negotiations between him and J, sold the property for the price fixed in plaintiff's authority. *Held*, that in the absence of any fraud or bad faith, plaintiff was not entitled to recover a commission. *Cards v. Perth*, 100 N. Y. S. 1043, 115 App. Div. 568, 103 N. Y. S. 1121; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892. The owner of land may sell the same himself, although he has placed it in the hands of a broker for sale, and the most the broker can claim is a commission on the sale. *Woolf v. Sullivan*, 224 Ill. 509, 79 N. E. 646.

Where an owner of real estate which he has listed with an agent for sale for a definite price, sells the same unaided to one ostensibly the purchaser but really acting for another, who was induced to purchase it by the efforts of the agent, but the owner acted in good faith and in ignorance of these efforts, and sold for a consideration less than that given to the agent, he is not, there being no exclusive agency, liable for the commissions agreed to be paid to the agent for the production of a purchaser ready, able and willing to pay what the owner demanded. *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65. (NOTE.—In that State the doctrine of the procuring cause of the sale is not in its fullest extent recognized, and, in the absence of an exclusive right of sale, to entitle a broker to a commission it must appear that the owner knew, or from the circumstances ought to have known, that the broker was instrumental in inducing the purchaser to enter into the contract.)

An owner listing his property for sale at a fixed price with a real estate broker, with knowledge that the latter on procuring a purchaser will charge a commission, is liable for the commission when the broker procures a customer to whom a

sale is made at the price fixed. *Gault v. Bradshaw*, 48 Wash. 364, 93 P. 534. A broker was employed to procure a purchaser for a farm within a specified time at a price which should net the owner \$11,000 and the broker \$875, or such less sum as should be satisfactory to the broker's agent having charge of the transaction; the owner sold the premises to a purchaser procured by the agent of the broker for \$11,000, and the purchaser paid the agent \$100 for commissions. *Held*, that the owner, if he knew that the agent in conducting the sale violated the instructions of the broker, was liable to the broker for commissions to the extent of \$875, on the ground that he was guilty of a fraud on the broker. *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21; *Thwing v. Clifford*, 136 Mass. 482.

Although the owner of property may, after authorizing the sale by a broker, contract with a purchaser by himself alone, without rendering himself liable to the broker for a commission, he is not relieved of such obligation if he sells to a purchaser found and stimulated to make the purchase by the efforts of the broker, even though he has no actual knowledge that the broker has been the procuring cause, provided the broker has not, in the meantime, abandoned his undertaking. *Sechrist v. Atkinson*, 31 App. (D. C.) 1.

Sec. 43. Covenants.

If an agent in selling land adds covenants not authorized by his authority, the purchaser may enforce so much of the contract as conforms to the authority, or claim a revision of the whole, if the principal will not execute a conveyance. *Venada v. Hopkins*, 1 J. J. Marsh (Ky.), 285, 293. An agent who effects a sale of his principal's lands, and enters into a covenant to convey and assure the land to the purchaser, is responsible to such purchaser under such covenant. *Harper v. Hampton*, 1 Harr. & J. (Md.) 622. See also Sec. 76a.

The great preponderance of authority now is, that a power, without restriction, to sell and convey real estate, gives authority to the agent to deliver deeds, with general warranty, binding on the principal where, under the circumstances, this is the common and usual mode of conveying. *LeRoy v. Beard*, 8 How. (U. S.) 451; *Peters v. Farnsworth*, 15 Vt. 155; *Venada*

v. Hopkins, 1 J. J. Marsh (Ky.), 293; *Taggart v. Stanberry*, 2 McLean (U. S.), 543; *Schultz v. Griffin*, 8 N. Y. St. 332, 24 N. E. 480. Sec. 417. (See Sec. 418 for authorities qualifying this doctrine.)

An agent acting under parol authority only can not bind his principal by a written covenant, under seal, signed with the name of such principal; such an instrument is not, in any sense, the deed of the principal unless delivered by him. *Harshaw v. McKesson*, 65 N. C. 688.

An owner of real estate employing a broker to procure a purchaser. *Held*, not required to inform the broker of the existence of restrictive covenants in the chain of title. *Ranger v. Leo*, 121 N. Y. S. 328.

Sec. 44. Conditional contracts.

Where plaintiff in an action to recover commissions for procuring a purchaser for real estate proves the execution of the contract of purchase, which defendant claims was signed conditionally, the burden of proving such defense is on the defendant. *Folinsbee v. Sawyer*, 36 N. Y. S. 405, 15 Misc. 293.

Sec. 45. Condition precedent to the contract of sale taking effect.

A vendor may, if he is doubtful of the proposed vendee's ability to carry out his contract of purchase, accept the contract conditionally, and agree to sell, provided the purchaser proves able to perform its conditions. *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326. See also Secs. 54, 65, 182.

An agreement providing for the sale and purchase of real estate, which stipulates that the contract shall be made at a specified time and place, that the commission to be paid to the broker for procuring the purchaser shall be paid on "closing of title," fixes the time when the commission shall be payable; but the actual closing of the title is not a condition precedent to a recovery of the commission, and the broker, on the owner refusing to complete the sale, may recover his commission. *Meltzer v. Strauss*, 113 N. Y. S. 583, 61 Misc. 250.

Where a principal, after hiring a broker to effect a loan, refused to accept it after it was arranged, the broker was ex-

cused from bringing the intending lender into the principal's presence, or furnishing him with the lender's name, as a condition precedent to his right to compensation. *Morrison v. Tuska*, 113 N. Y. S. 611.

Sec. 46. Death, and its effect on contracts.

An agency may be terminated by the death of the principal. *Crowe v. Trickey*, 204 U. S. 228, affirming 71 P. (Ariz.) 965; *Crowe v. Harmon*, 204 U. S. 241, affirming 71 P. (Ariz.) 1125; *Kyle v. Gaff*, 105 Mo. App. 672, 78 S. W. 1047; *Shisler's Est.*, 2 Pa. Dist. Ct. 588.

In an action by a broker for his commissions in negotiating an exchange of properties, reference in a single letter by one of the parties to the trade to the other, indicating that the proposition had been submitted to him by plaintiff, and the testimony of the other party that it was through plaintiff that he came to know the former, and that he had the property in question to trade, are not sufficient to show plaintiff's employment by the party writing the letter, where it does not appear that any demand for commissions was made by the plaintiff until the party's death, though he lived for some months afterward. *Ehrenroth v. Putnam* (Tex. Civ. App. '00), 55 S. W. 190.

Sec. 47. Approval of principal.

One employed to sell land at an agreed price and who receives in part payment land of a certain character within a specified locality, can not recover commissions where the owner refuses to consummate the trade, if the contract of employment provided that the sale should be subject to the owner's approval. *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218; *Denis v. Tilton*, 120 La. 226, 45 S. 112; *Slayback v. Wetzel* (Mo. App. '09), 123 S. W. 598.

If a broker employed to purchase an estate buys it for himself, it is necessary, in order to unfold the transaction and render him liable to account, that the agency of the broker for the principal be approved. *Lazarus v. Sands*, 33 N. Y. S. 855, 12 Misc. 575, 27 N. Y. S. 885, 7 Misc. 282. Where the contract of sale was to be approved by the owner, an instruction

that plaintiff was entitled to commissions if he found a purchaser, though defendant refused to carry out the trade, was erroneous. *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218.

Sec. 48. Abbreviations.

Where the abbreviations used in a broker's authorization were such that parties familiar with land descriptions could understand them easily, their use did not render the authority void for uncertainty. *Meline v. Ruffino*, 129 Cal. 514, 62 P. 93.

CHAPTER IX.

SECTION.

49. Ambiguous contract.

50. Banks.

51. Consent.

52. Caveat emptor.

SECTION.

53. Credit.

54. Contingency.

55. Changes in contracts.

56. Counter proposition.

Sec. 49. Ambiguous contracts.

Where letters from the owner of land to a real estate broker named terms of sale, and told the broker if he could effect sales the owner would be glad, but that the right to refuse offers was reserved, that the broker might wire if he found a customer at the price named, and he could have the land and the broker his commission, it was held that where the language was ambiguous, the ambiguity must be taken most strongly against the owner, especially where third persons have acted thereunder, and the broker having found persons ready to purchase on the terms named, was entitled to his commissions, although the owner refused to sell. *Hopwood v. Corbin*, 63 Iowa, 218, 18 N. W. 911.

Sec. 50. Banks.

The cashier of a bank having implied authority, as its executive officer, to contract for the disposal of lands acquired by the bank in the collection of its credits, will bind the bank by his contract to pay commissions for the disposal of lands placed in the hands of a broker, but which through mistake in identity the bank does not own. *Arnold v. Nat. Bk. of Waupaca*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

Where a real estate agent furnished a purchaser who was able and willing to buy, and who entered into a contract providing that he should deposit \$500, which should be returned if any defect existed in the title which the seller could not cure in thirty days, and the contract failed of consummation solely

because there was such a defect, the fact that the check which was deposited according to the contract was on a bank from which the prospective buyer withdrew his funds, and the check was afterward refused, did not preclude the agent from recovering his commissions. *Perkins v. Kimberlin*, 110 Mo. App. 661, 85 S. W. 630.

Where a bank agrees to pay a real estate broker a commission on the sale of lands, it can not set up as a defense that, under the laws of the State in which the land is situated, a bank is prohibited from dealing in real estate, where it has availed itself of the benefits of the sale. *Church v. Johnson*, 93 Iowa, 544, 61 N. W. 916.

Sec. 51. Consent.

If an agent employed to sell property buys it for himself, in an action for compensation the burden of proving that the principal had knowledge of the facts and consented to the sale rests on the agent. *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Grant v. Hardy*, 33 Wis. 668.

If a broker is employed as the agent of either party so that that party relies on him to secure the best bargain possible, then the general rule forbidding double employment applies, and the broker can not recover commissions from both parties to the transaction. *Bates v. Copeland*, McArthur & M. (D. C.) 50; *Lloyd v. Colston*, 5 Bush (Ky.), 587; *Raisin v. Clark*, 41 Md. 158; *Follansbee v. O'Reilly*, 135 Mass. 80; *Harwitz v. Pepper*, 128 Mich. 688, 87 N. W. 1034; *Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229; *Leathers v. Canfield*, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; *Scribner v. Collier*, 40 Mich. 375; *Dartt v. Sommesym*, 86 Minn. 55, 90 N. W. 115; *De Steiger v. Hollington*, 17 Mo. App. 382; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.), 245; *Dunlap v. Richards*, 2 E. D. Smith (N. Y.), 181; *Watkins v. Consell*, 1 E. D. Smith (N. Y.), 65; *Brierly v. Connelly*, 64 N. Y. S. 9, 31 Misc. 268; *Norman v. Reuther*, 54 N. Y. S. 152, 25 Misc. 161; *Linderman v. McKenna*, 20 Pa. Super. Ct. 409; *Meyer v. Hanchett*, 43 Wis. 246.

Unless they consent to his acting for both, either expressly or by clear implication. *Alexander v. N. W. Chr. Univ.*, 57 Ind. 466; *Scribner v. Collier*, 40 Mich. 375; *De Steiger v. Hollington*,

17 Mo. App. 382; *Rowe v. Stephens*, 53 N. Y. 621; *Geery v. Pollock*, 44 N. Y. S. 673, 16 App. Div. 321; *Abel v. Disbrow*, 44 N. Y. S. 573, 15 App. Div. 536; *Lansing v. Bliss*, 33 N. Y. S. 310, 86 Hun, 205; *Dunlap v. Richards*, 2 E. D. Smith (N. Y.), 181; *Whiting v. Saunders*, 49 N. Y. S. 1016, 22 Misc. 539; *Haviland v. Price*, 26 N. Y. S. 757, 6 Misc. 372; *Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850; *Maxwell v. West*, 23 Pa. Co. Ct. 302; *Meyer v. Hanchett*, 43 Wis. 246; *Cass v. Tolbert* (Tex. Civ. App. '08), 112 S. W. 1077.

The fact that a broker employed to effect a sale is a director in the corporation which he procures to buy the property, does not prevent him from recovering a commission, where the person who practically owns the capital stock of the corporation consented to the transaction, the question of fair dealing being submitted to the jury. *Goldshear v. Barrow*, 85 N. Y. S. 395, 42 Misc. 198. Mere consent by a person to the rendition by a real estate agent of unsolicited services which result in a sale of the property, does not, of itself, create a contract or entitle the broker to recover compensation under an implied promise of remuneration for such voluntary services. *Viley v. Pettit*, 96 Ky. 576, 16 Ky. L. R. 650, 29 S. W. 438; *Weinhuse v. Cronin*, 68 Conn. 250, 36 A. 45. *Contra*, *Kinder v. Pope*, 106 Mo. App. 536, 80 S. W. 315.

T and W entered into a contract with O to sell real estate for him within a certain time, on certain commissions; before the expiration of the time O requested the return of the agreement; W offered to purchase the land himself rather than lose the sale; the relation between the parties was that of principal and agent, and could not be changed without O's consent into that of vendor and purchaser. *Tower v. O'Neil*, 66 Pa. St. 332.

Sec. 52. Caveat emptor.

A purchaser of real estate is entitled to rely on the representation of the agent for the sale thereof as to its location, and is not bound by the doctrine of *caveat emptor* to make further inquiries as to its boundaries. *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034; *Selby v. Matson*, 114 N. W. 609, 137 Iowa 97. Compare Sec. 348.

Sec. 53. Credit.

An agent to sell land on credit has no implied authority to receive payment therefor, nor to receive payment before due, nor in anything but money. *Mann v. Robinson*, 19 W. Va. 49. Compare Sec. 325. A broker employed to sell real estate has no authority to bind his principal by a contract to sell on credit unless expressly authorized. *Staten v. Hammer*, 121 Iowa, 499, 96 N. W. 964; *Smith v. McCann*, 205 Pa. St. 57, 54 A. 498; *Edwards v. Davidson* (Tex. Civ. App. '04), 79 S. W. 48; *Rundle v. Cutting*, 18 Colo. 337, 32 P. 994; *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Wanless v. McCanless*, 38 Iowa, 20. And to sell on credit, a sale for the amount in cash is unauthorized. *Jackson v. Marohn* (S. D. Sup. '09), 119 N. W. 988.

Where land is entrusted to real estate agents to sell and collect the purchase money, the purchaser is entitled to credit for payment to an agent of the real estate agents, although made after he was discharged, he having been held out as authorized to receive payments due on contracts, and notice of the withdrawal of his authority not having been given to the purchaser. *Meeker v. Manning*, 162 Ill. 203, 44 N. E. 397. See also Sec. 335.

Defendant made plaintiff his agent for the sale of certain lands for cash, all the price above a certain amount to belong to plaintiff as his compensation; plaintiff found a purchaser willing to pay such sum in cash and the excess to plaintiff on time. *Held*, that such sale complied with the terms of the agreement. *Van Garder v. Sherman*, 81 Iowa, 403, 46 N. W. 1087.

Sec. 54. Contingency.

In an action by a broker to recover commissions for selling land, evidence that the act of the defendant prevented the happening of the contingency on which payment was to be made was inadmissible, the excuse not being pleaded by the plaintiff. *Turner v. Lane*, 93 N. Y. S. 1083, 47 Misc. 387. A broker may by special agreement with his principal so contract as to make his compensation depend upon a contingency which his efforts can not control, even though it relates to the acts of his principal. *Hind v. Henry*, 36 N. J. L. 328; *Lassen v. Bayless*, 125 Fed. 744, 60 C. C. A. 512; *Berry v. Tweed*, 93 Iowa, 296, 61 N. W.

858; *Stewart v. Fowler*, 37 Kan. 677, 15 P. 918; *Flower v. Davidson*, 44 Minn. 46, 46 N. W. 308; *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245, 55 A. 305; *Brown v. Grossman*, 65 N. Y. S. 1126, 53 App. Div. 640; *Hodgkins v. Mead*, 8 N. Y. S. 854. See also Secs. 40, 45, 65.

A written agreement, after reciting that defendant had contracted to sell a farm to one H, "contingent on the allowance of a certain pension to H," the latter's ability to pay the price being entirely dependent upon the allowance of said pension claim, provided that, in case the sale should be "perfected by the payment of said purchase money" to defendant, "in the event said pension is allowed," defendant should pay a specified commission to plaintiff, who had helped bring about the contingent sale, but if the "pension should not be allowed and paid over to defendant plaintiff should receive nothing; the price to be paid for the farm was \$12,000 and the pension claim was for \$9,500, of which H received \$6,000, but never paid more than \$1,000 to defendant. Held, that plaintiff was not entitled to a commission. *Cobb v. Kenner* (Ch. App. Tenn.), S. W. 277.

Sec. 55. Changes in contracts.

A contract for the sale of lands was executed by the owner and left with his agent for the sale of such land for delivery to the purchaser, the agent altered the instrument by substituting the name of another person, and changed both the consideration and the rate of interest, and delivered it to such other person. Held, that the contract so delivered was not the contract of the owner. *Ballou v. Bergenson*, 9 N. D. 285, 83 N. W. 10. See also Sec. 293.

The right of plaintiff, a real estate agent, to recover on his contract for the sale of the defendant's interest in lands for a certain sum is not affected by a change, without defendant's knowledge, in the agreement relative to the purchase of the other interests. *Good v. Smith*, 44 Ore. 578, 76 P. 354. Where a letter to a real estate broker authorized the sale of certain property for \$30,000, subject to change at any time, but no change was made or suggested until after a sale was negotiated, a subsequent change and a refusal of the owner to com-

plete the sale at the price first named was ineffective to bar the broker's right to commissions. *Warren Com. & Inv. Co. v. Hull, R. E. Co.*, 120 Mo. App. 432, 96 S. W. 1038; *Millan v. Porter*, 31 Mo. App. 563. See also Sec. 454. *Simmins v. Oneth* (Mo. App. '10), 124 S. W. 534.

Sec. 56. Counter Proposition.

A broker employed to procure a purchaser procured one who offered a specific sum, which the owner rejected; the owner made a counter proposition which the purchaser rejected; thereafter the purchaser offered to accept the counter-proposition, but the owner then refused to sell. *Held*, that the broker was not entitled to his commissions, for, on the owner rejecting the purchaser's offer and making a counter offer, which the purchaser refused, the matter was at an end, and no subsequent acceptance of the counter-offer could revive it. Compare Secs. 72, 173. *Bailey v. Moorhead*, 122 Mo. App. 268, 99 S. W. 39; *Talcott v. Mastin*, 20 Colo. App. 488, 79 Pac. 973. Where an alleged purchaser replied to the offer made with a counter-proposition that could not be construed as an acceptance of any of the terms of sale made by the owner the real estate agents employed to procure a purchaser were not entitled to any commissions. *Winters v. Portwood* (Tex. Civ. App. '08), 109 S. W. 388.

CHAPTER X.

SECTION.

57. Deeds.

SECTION.

58. Deeds, their execution by agents.

Sec. 57. Deeds.

Testimony that a deed was tendered to the principal "in pursuance of an agreement between" the parties is sufficient, *prima facie*, to sustain a finding that it was delivered within thirty days. *Beebe v. Roberts*, 3 E. D. Smith (N. Y.), 194.

Mere insolvency of the purchaser does not defeat the broker's right to a commission, where the sale contemplates being secured by a bond and deed of trust, which the purchaser is prepared to deliver. *Ross v. Fickling*, 11 App. Cas. (D. C.) 442. A petition which alleges that the sale failed because of an unsatisfied deed of trust on the property which the defendant had failed to release or have cancelled, is not defective in failing to allege that the deed was a lien on the property, or that defendant refused to consummate the sale. *Gerhart v. Peck*, 42 Mo. App. 644.

A deed executed by the principal to the purchaser after the commencement of the suit, is inadmissible to show the principal's ratification of the agent's contract. *Gelott v. Ridge*, 117 Mo. 553, 23 S. W. 882. The defendant having assented to the terms of the written agreement to exchange the agreement and deed of conveyance were competent evidence of the sale and the consideration thereof. *Hewitt v. Brown*, 21 Minn. 163; *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994; *Levy v. Crogan*, 16 Daly, 137, 9 N. Y. S. 534; *Cannon v. Castleman*, 24 Ind. App. 188, 55 N. E. 111.

The defendant was the owner of a parcel of real estate which he authorized the plaintiff to sell for a certain sum; nothing was said relative to the kind of deed to be given; the broker found a purchaser who refused to complete the

transaction unless the defendant would give him a warranty deed, notwithstanding the defendant had a good title to the property; the defendant would not give a warranty deed, but offered to give a quit-claim deed, in the usual form, with special covenants, and so the sale was not executed. *Held*, that the broker was not entitled to commissions. *Garcelon v. Tibbetts*, 84 Me. 148, 24 A. 797.

In an action for a broker's commissions for negotiating a purchase which defendant refused to consummate, a deed, and a receipt, purporting to have been signed and acknowledged by the owner, and proof of a tender, were admissible with other proof, as tending to show that defendant could have obtained the property at his offer had he desired to do so, where no objection was raised to their form or genuineness. *Hanna v. Espella*, 148 Ala. 313, 42 S. 443.

A loan agent acting for B secured the latter's note and mortgage, but failed to effect the loan, and, while still holding the note and mortgage, which had been placed on record, bought the land under a sheriff's deed. *Held*, that good faith required the agent to secure the release of the mortgage before taking the deed, and that having failed to do so, the deed would be set aside. *Smeltzer v. Lombard*, 57 Iowa, 294. It requires an instrument under seal to ratify the unauthorized deed of an agent. *Spofford v. Hobbs*, 29 Me. 148; *Drumright v. Philpot*, 16 Ga. 424; *Reese v. Medlock*, 27 Tex. 120.

Deed of a guardian executed to defraud wards set aside and mortgage by grantee held null and void. *Dormitzer v. German Sav. & Loan Co.*, 23 Wash. 132, 62 P. 862. Deed improperly secured by agent set aside. *Clark v. Bird*, 72 N. Y. S. 769, 66 App. Div. 284. Where a brokerage contract provided that the broker's authority to sell defendant's land should continue until withdrawn in writing, and defendant sold the land and gave a deed to the purchaser, the deed was not such a withdrawal of authority before such sale as would put an end to the contract by which defendant agreed to pay a commission if she sold the property herself during the life of the contract. *Kimmel v. Skelly*, 130 Cal. 555, 62 P. 1067. Where a broker's authorization to sell land was in force when the sale took place his rights were not affected by the fact that

the deed did not pass until later. *Hull v. McCoy*, 1 Cal. App. 159, 81 P. 1015.

In a suit against a real estate broker and lawyer, by a former customer or client, to vacate certain deeds procured by him to be executed by her in his interest, and for the cancellation of an alleged compromise agreement confirming such deeds, it was held that, on a review of the evidence showing, among other things, that the defendant had purchased one interest from the complainant for \$1,075, worth \$2,500, and that shortly prior thereto he had collected over \$800 for her, for which he failed to account, that whether, in view of the fiduciary relations of the defendant to the complainant, the burden was on him to show the validity of the transactions, the testimony, as a whole, was sufficient to justify vacating the deeds and cancelling the agreement. *Holtzman v. Linton*, 27 App. (D. C.) 241.

Where an agent lawfully authorized to contract to sell real estate has attempted to convey the same by deed under a defective power of attorney, the deed will be treated in equity as a valid contract for the sale thereof. *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963. See also Sec. 592.

An authorization to an agent to sell real estate for \$8,000, \$3,000 cash, entitles him to the agreed compensation if he secures a purchaser bound to the agreed terms, as the \$3,000 cash means only the payment of such sum on delivery of a deed by the principal. *Goss v. Broom*, 31 Minn. 484. See also Secs. 410, 410a. An agent acting under parol authority can not bind his principal by a written covenant under seal, signed with the name of such principal. Such an instrument is not, in any sense, the deed of the principal unless delivered by him. *Harshaw v. McKesson*, 65 N. C. 688.

Sec. 58. Deeds, their execution by agents.

One who has authority from another to execute a deed or other instrument under seal, should do it in the name of that other, and not in his own name, even as agent. *Robbins v. Butler*, 24 Ill. 428. If an agent sign and seal a deed in his own name, it does not bind the principal, though in the body of the deed it is stated to be made by the agent in behalf of

his principal. *Bellas v. Hayes*, 5 Serg. & R. (Pa.) 427; *Fitch on Real Est. Ag.*, p. 97, citing *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

A deed which ran, "Know all men by these presents that I, A. B., as agent for C. D., do hereby grant, sell and convey," etc., and signed "A. B. for C. D." was held to be the deed of "A. B." and not "C. D." Story on Ag. Sec. 154. Where an agent executed a deed in his own name, although he covenanted "for and on behalf" of his principal, he was held personally bound, and not his principal. *Appleton v. Binks*, 5 East (Eng.), 148.

CHAPTER XI.

SECTION.

- 59. Description of property.
- 60. Drunkenness.
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SECTION.

- 69. Indirect acts ineffectual to establish contractual relations.
- 69a. Indirect sale which authorizes commissions to broker.
- 70. Information, acted on by broker not establishing contractual relations.
- 71. Insurance company, broker obtaining loan from, not agent of.

Sec. 59. Description of property

In a contract with a real estate broker for the sale of certain property, the description, "My property, 48 Eldridge Court," is sufficiently definite to enable the broker to recover commissions, the contract being dated at Chicago, where there is a number 48 Eldridge Court, of which the principal is a part owner. *Weaver v. Snow*, 60 Ill. App. 624; *Powers v. Bohoslav* (Neb. Sup. '09), 120 N. W. 942; *Schultz v. Griffin*, 8 N. Y. St. Rep. 332. Rev. 121 N. Y. 294, 24 N. E. 480. See also Sec. 428a; *Tilden v. Smith* (S. D. Sup. '10), 124 N. W. 841. In a petition for a commission for finding a purchaser it is not necessary to particularly describe the land. *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790; *McAllister v. Walker*, 39 Minn. 535, 41 N. W. 107.

A real estate broker authorized to sell a tract of land spoken of by the owner as being on the line of a certain canal, has no authority to sell it by any other description than that by which it was purchased by the owner, and the broker's commissions are not earned where the trade falls through because

the contract made by the broker with the intending purchaser described the tract as containing a stated number of acres south of the canal, whereas it was described in the conveyance to the owner as being that number of acres south of the center of the canal. *Ward v. Lawrence*, 79 Ill. 295; *Scott v. Gage*, 16 S. D. 285, 92 N. W. 37. See also Sec. 476

Sec. 60. Drunkenness in its relation to competency to make a contract.

Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable a party to avoid his contract; such excitement and drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind at the time of entering into the contract; absolute drunkenness does not mean complete insensibility, and the use of this phrase in the instruction does not render it objectionable. *Cavender v. Waddingham*, 5 Mo. App. 457.

Sec. 61. Fixed price.

Where the principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for the commission, although the sale is made at a lower price than that originally proposed by him to the broker. *Crook v. Forst*, 116 Ala. 395; 22 S. 540; *Williams v. Bishop*, 11 Colo. App. 378, 53 P. 239; *Schegal v. Allerton*, 65 Conn. 260, 32 A. 363; *Baker v. Murphy*, 105 Ill. App. 151; *Loehde v. Halsey*, 88 Ill. App. 452; *McConaughty v. Mehannah*, 28 Ill. App. 169; *Plant v. Thompson*, 42 Kan. 664, 22 P. 726; *Ratts v. Shepherd*, 37 Kan. 20, 14 P. 496; *Hubachek v. Hazard*, 83 Minn. 437, 86 N. W. 426; *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *Stinde v. Bleach*, 42 Mo. App. 578; *Wetzel v. Wagoner*, 41 Mo. App. 509; *Martin v. Silliman*, 53 N. Y. 615; *Martin v. Fegan*, 88 N. Y. S. 472, 95 App. Div. 154; *Levy v. Coogan*, 16 Daly, 137, 9 N. Y. S. 534; *Chilton v. Butler*, 1 E. D. Smith (N. Y.), 150; *Hobbs v. Edgar*, 51 N. Y. S. 1120, 23 Misc. 618; *Gold v. Serrill*, 26 N. Y. S. 5, 6 Misc. 124; *Steinfeld v. Strom*, 63 N. Y. S. 966, 31 Misc. 167; *Keys v. Johnson*, 68 Pa. St. 42; *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509; *Byrd v. Frost* (Tex. Civ.

App. '94), 29 S. W. 46; *Barnes v. German Sav., etc., Soc.*, 21 Wash. 448, 58 P. 569; *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1131. Unless the right to a commission is made conditional upon a sale being effected at the price fixed in the broker's authority. *Armes v. Cameron*, 19 D. C. 435; *Buhl v. Noe*, 51 Ill. App. 622; *Schwartz v. Yearly*, 31 Md. 270; *Child v. Ptomey*, 17 Mont. 502, 43 P. 714; *Briggs v. Rowe*, 1 Abb. Dec. (N. Y.) 189, 4 Keyes, 424; *Steinfeld v. Storm*, 63 N. Y. S. 966, 31 Misc. 167; *Sargent v. Story* (Tex. Civ. App. '01), 61 S. W. 977; *McArthur v. Slosson*, 53 Wis. 41, 9 N. W. 781. See also Sec. 133.

A broker who has the exclusive right for sixty days to sell at a fixed price certain real estate, can not bind his principal by a contract in which the time for the completion of the purchase and the payment of the price is extended thirty days after the expiration of the sixty days. *Smith v. McCann*, 205 Pa. 57, 54 A. 498. See Sec. 14 for time beyond the limit allowed to examine the title.

Sec. 62. Guardian or minor.

Where in employing plaintiff as a real estate broker to effect a sale of land, defendant acted as the guardian of a minor and had no personal or private interest in the property, all of which was known to the plaintiff, and that he never made any contract to pay individually for making the sale, defendant can not be charged individually for a commission. *Hudson v. Scott*, 125 Ala. 172, 28 S. 91; *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128.

A guardian by fraudulent proceedings in court obtained an order and sold property inherited by his ward, and his vendee, who participated in the fraud, afterwards mortgaged the property to secure a large loan; the mortgage was made through a broker, and the mortgagee testified that the broker was defendant's agent for the service of process and for no other purpose, and that defendant dealt with him as with other brokers; the broker passed on the value of the securities, fixed the terms of the loans, subject to the mortgagee's approval, looked after the title, employed attorneys to examine the same, received the money and paid it to the mort-

gagors, and in letters to the mortgagee spoke of the loans as made "by us;" in negotiating the loan in question he was associated with a third person, and attorneys were employed by them who knew of such fraudulent probate proceedings, and that the proceedings were made for the purpose of showing a clear title to the mortgaged property. *Held*, sufficient to show that the broker was the agent of the mortgagee as to make notice of the fraud to him sufficient notice to the mortgagee to prevent the defense of good faith by it to an action by the ward to set aside such sale and mortgage as fraudulent. *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 P. 862.

Sec. 63. Undivided interest.

Where a power of attorney authorized an agent "to grant, bargain and sell certain lands, or any part or parcel thereof, for such sum or price, on such terms as to him shall seem meet, and for me and in my name to make, etc., deeds for the same, either with or without covenants of warranty;" it was held that the agent had authority to sell on reasonable credit, had authority to receive payment, and a payment to him was a good payment to the principal; if circumstances rendered it favorable for the interest of his principal he might include other valuable considerations besides money in the consideration, and might sell an undivided interest in the property. *Carson v. Smith*, 5 Minn. 78.

Sec. 64. Interest of tenant in common.

Defendant was tenant in common of certain premises of which he wished to dispose, and employed plaintiff to sell his interest for him; plaintiff attempted to negotiate a sale to defendant's co-tenant, but was unable to get any definite price or terms from defendant; finally, at plaintiff's suggestion, the co-tenant himself saw defendant, and a settlement was reached by which defendant conveyed the larger part of the premises to the co-tenant, but retained a small tract for himself for his own benefit and according to his own desires. *Held*, that the deal as consummated amounted to a sale within the meaning of the contract with plaintiff for commissions. *Burden*

v. *Briquilet*, 125 Wis. 341, 104 N. W. 83; *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160.

Sec. 65. Contract conditional on securing other interests.

Where the real estate agents and the parties to the proposed exchange of properties understood that the agreement for the exchange, and any right to commissions, were dependent upon the defendants' acquiring outstanding interests in the property they proposed to exchange, and that their acceptance of the terms of the exchange offered by the other parties was, in fact, conditional on their acquiring such interests, commissions can not be recovered of defendants, their failure to acquire such interests not having been by their procurement or connivance. *Rieger v. Merrill*, 125 Mo. App. 541, 102 S. W. 1072. See also Sec. 45.

Sec. 66. Consolidation of interests not a sale.

Where, to acquire means of irrigation for lands so as to make them salable, they were transferred to a land irrigation company, the owner taking stock and bonds therefor, the transaction was a consolidation of interests, and not a sale of the land within the contract entitling plaintiff to commissions for services in effecting a sale of the lands. *Close v. Browne*, 230 Ill. 228, 82 N. E. 629.

Sec. 67. Payments in installments.

Where a vendor agreed to pay his agent's commissions for selling the land out of the purchase money as it was paid in proportionate amounts, and on foreclosure of the purchase money mortgage, the vendor bids in the property for the full balance then unpaid and costs, the whole commission becomes due on the confirmation of such foreclosure sale. *Crane v. Eddy*, 191 Ill. 645, 61 N. E. 431, 85 Am. St. Rep. 384.

In an action for a broker's commissions, evidence that defendant applied to witness to know what to do concerning the proposed purchaser's proposition to pay for the land in monthly installments, the witness's advice given in response, was inadmissible. *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

A contract to perform a given duty for a given sum would be entire, but a contract to perform the same duty for a given sum, to be paid in installments as the performance progressed, would be severable, so far as the right to recover the several installments is concerned. Mechem on Agency Sec. 634.

Sec. 68. Introduction of prospective purchaser.

A broker is not entitled to compensation for merely introducing the vendee, unless his character as such agent was disclosed to the principal at the time of contract. *Keener v. Harrod*, 2 Md. 63; *Bassford v. West*, 124 Mo. App. 248, 101 S. W. 610. See also Secs. 450, 532. Where a real estate broker was not acquainted with the purchaser, and did not introduce him to the seller, the effectiveness of the broker's instrumentality in bringing about the sale must be affirmatively proved to entitle him to commissions. *Halterman v. Leining*, 90 N. Y. S. 1093, 45 Misc. 397.

While an agent employed to sell land must find a purchaser ready, able and willing to buy on the terms proposed before he has earned his commissions, that rule does not apply to one who is only hired to render the preliminary service of introducing the seller to persons who shall afterwards buy. *Mayer v. McCann*, 136 Ill. App. 501, affirmed 232 Ill. 507, 83 N. E. 1042.

To entitle a broker to recover commissions on a sale of land direct by the owner to a purchaser originally introduced to the owner by the broker, the latter must show, not only that he introduced the buyer, but affirmatively that the buyer was induced to apply direct to the owner by the means employed by the broker. *English v. Wm. George Realty Co.* (Tex. Civ. App. '09), 117 S. W. 996.

Sec. 69. Indirect acts of broker ineffectual to establish contractual relations.

The owner of a house having received from his son a telegram asking his lowest price for the house, which was sent at the instigation of a real estate broker, answered stating the price he would take, no sale was made to the person whom the broker had in view as a purchaser, on account of certain incumbrances on the property; eight months afterward the same

person, through another broker, purchased the house, the incumbrances having been removed. *Held*, that the former broker was not entitled to a commission for effecting the sale. *Chandler v. Sutton*, 5 Daly (N. Y.), 112. See also Sec. 448. Compare Sec. 446.

An agent, to procure a purchaser of property, can not recover commissions for effecting a sale, on proof that the purchaser, without solicitation by the agent, became aware that the property was for sale by overhearing negotiations between the agent and another. *Monson v. Carlstrom* (Iowa Sup. '09), 119 N. W. 606.

Sec. 69a. Indirect sale which authorizes commissions to broker.

A broker "indirectly" interested the purchaser in the property, and so was entitled to the commissions provided for, though the sale was made by the owner, unless to one not interested in the property through the broker "in any way, directly or indirectly," where the broker brought the property to the attention of and showed it to G, and G then gave the information so acquired to P, and P acted thereon, inspected the property and reported his information to C, who, acting on such information, went to the property and examined it, and thereupon bought it directly of the owner. *Shober v. Dean* (Mont. Sup. '09), 102 P. 323.

Sec. 70. Information, acted upon by broker, not establishing contractual relations.

Where the owners of real estate expressly refused to employ the plaintiff, a broker, in selling their property, it was held that the mere fact that the plaintiffs, after ascertaining the price charged for the property, sent a purchaser to whom a sale was effected, did not entitle the broker to recover commissions. *Pierce v. Thomas*, 4 E. D. Smith (N. Y.), 354. See also Sec. 178.

Sec. 71. Insurance company, broker obtaining loans from not agent of.

The fact that a loan agent who is in the habit of sending applications to, and obtaining loans from, an insurance com-

pany as well as other parties, is the agent of such company for the purpose of procuring insurance, does not constitute him their agent in respect to loans obtained by him from them. *Mass. Mut. Life Ins. Co. v. Boggs*, 121 Ill. 119, 13 N. E. 550.

CHAPTER XII.

SECTION.

- 72. Written proposition from proposer and acceptance by agent makes binding contract.
- 73. On failure of vendor to re-execute contract after purchaser materially altered, no meeting of minds.
- 74. Signature of principal by agent.
- 75. Signature of principal by agent should be followed by his as agent.
- 76. Signature of B, as attorney for parties of first part, failed to bind the principal.
- 76a. Agent contracting as principal personally liable as such.
- 77. Signature placed at bottom or top suffices.

SECTION.

- 78. The word "subscribed" equivalent to "signed."
- 79. In some States contract to divide commissions must be in writing.
- 79a. Unless barred by statute broker may be authorized by parol to sell or lease real property.
- 79b. In certain States contracts for the sale of lands must be in writing.
- 80. Broker on procuring customer sending telegram to owner, Telegraph Co., not agent as to notice.
- 81. Telegram must reach owner before he signs contract with another or it is too late.

Sec. 72. Written proposition from proposer and acceptance by agent makes binding contract.

A written proposition to employ one as agent to sell land signed by the proposer and accepted by the agent, though not signed by him, makes a binding contract of agency enforceable against both. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92. Compare Sec. 56.

Sec. 73. On failure of vendor to re-execute contract after purchaser materially altered the same, there was no meeting of minds.

Where a broker, in an action for services in procuring defendant a purchaser for land, claimed that both parties had signed and delivered duplicate contracts for sale, and defend-

ant claimed that after he signed the papers the purchaser took them and signed only after making material alterations therein, and that he thereupon refused to re-execute the contract as altered, and that they were never delivered, it was error to refuse an instruction that if, after defendant executed the contracts, they were altered before the purchaser executed them, and were never subsequently re-executed, there was no meeting of minds. *Bruce v. Hurlbut*, 66 N. Y. S. 1127, 54 App. Div. 616. See also Sec. 33.

Sec. 74. Signature of principal by agent, in his presence, is that of principal.

Where a principal's name is signed by the agent at the request of the principal, and in his presence, the signature is deemed that of the principal himself, since the agent does not act in that capacity, but merely as the hand or amanuensis of the principal, and in such case the agent signs the principal's name only as if the principal had himself signed it. *Gardner v. Gardner*, 5 Cush. (Mass.) 483; *R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Meyer v. King*, 29 La. Ann. 567, 569. Compare Sec. 18.

Sec. 75. Signature of principal by agent should be followed by his as agent.

Only the name of the principal should be used in the body of the instrument, as one of the contracting parties, the agent should then sign the principal's name to it, and then his own as agent. *Mears v. Morrison*, 1 Breese (Ill.), 172; *Bingham v. Stewart*, 13 Minn. 106; *Smith v. Morse*, 9 Wall. (U. S.) 76.

Sec. 76. Signature of B, as attorney for parties of first part, failed to bind the principal.

Where a contract for the sale of lands stated in the body of it that it was made by the parties of the first part, without naming them, by B, their attorney, the concluding clause was, "In witness whereof said B, as attorney for the parties of the first part, and said parties of the second part, have hereunto set their hands and seals," and B. signed his own name only, with a single seal, it was held that the parties of the first part were not bound, and that the instrument should

have been executed in the name of the principals, and purport to be sealed with their seals instead of the seal of the attorney. *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

Sec. 76a. Agent contracting as principal personally liable as such.

Where an agent contracts as principal, and does not disclose his agency, he is personally liable as principal. *Loehde v. Halsey*, 83 Ill. App. 452. See also Secs. 43, 383.

Sec. 77. Signature placed at bottom or top a sufficient compliance with statute.

The requirement of a statute that a contract for the sale of lands between a broker and the owner be subscribed by both parties is met when the signature of the parties is placed thereon to authenticate and give effect to the contract, whether placed at the bottom, the top, or in the body of the instrument. *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989.

Sec. 78. Signature, the word "subscribed" is equivalent to "signed."

The word "subscribed," as used in a statute requiring a contract for the sale of lands, between a broker and the owner, to be in writing, subscribed by both parties, is synonymous with the word "signed." *Id.*

Sec. 79. In some States a contract to divide commissions with a sub-agent must be in writing.

Burns' Anno. Stat. 1901, Sec. 6629a, declares that no contract for the payment of any sum as commissions for finding a purchaser for the real estate of another, shall be valid unless the same shall be in writing, signed by the owners of the real estate or his legally appointed and duly qualified representative. *Held*, that such section did not invalidate a written contract between real estate brokers by which one of them agreed to pay the other one dollar per acre for finding a purchaser for land which the first broker had for sale. *Provident T. Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030. And that letters qualifying the original authority to pay plaintiff

\$1 per acre for finding a purchaser did not constitute a revocation of the authority. *Id.*

Sec. 79a. Unless barred by statute, broker may be authorized by parol to make a valid contract to sell or lease real property.

Except in those States where the statutes expressly require the authority to be in writing, an agent may be authorized by parol to make a valid contract for the sale or the leasing of his principal's lands. Mechem on Ag. Sec. 89.

Sec. 79b. In certain States a contract for the sale of lands must be in writing.

Alabama, Arkansas, California, Colorado, Illinois, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, Ohio and Pennsylvania. Mechem on Agency Sec. 89.

Sec. 80. Broker on procuring customer sending telegram to owner, Telegraph Company not agent as to notice.

The understanding that a real estate broker, on procuring a purchaser of land, should wire the owner, does not constitute the telegraph company the owner's agent, so that a notice to the company that a purchaser has been procured is not notice to the owner until the telegram is actually received by him. *Johnson v. Wright*, 124 Iowa, 61, 99 N. W. 103. See also Sec. 15.

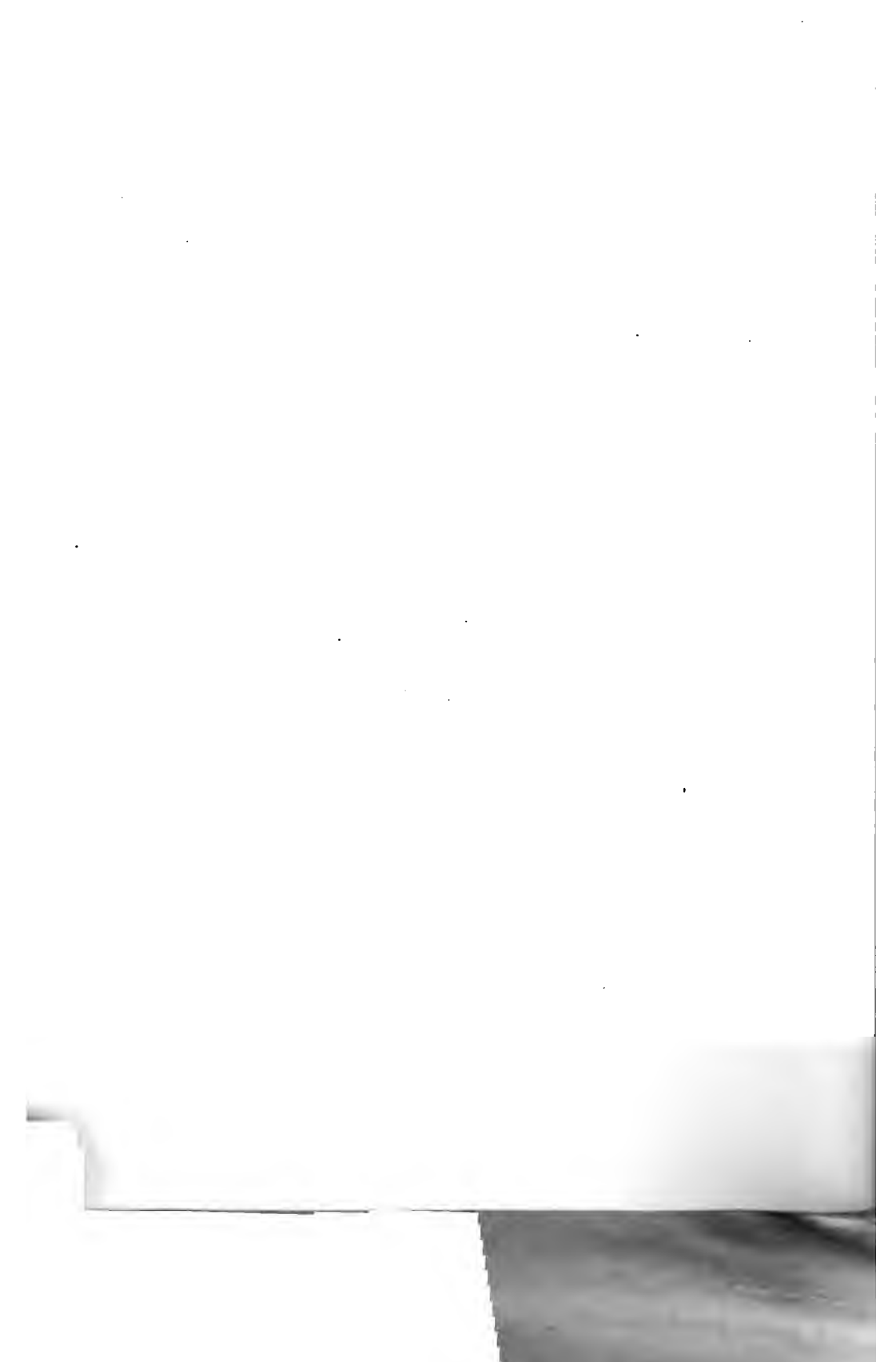
Sec. 81. Telegram must reach owner before he signs contract with another or it is too late.

In an action for commissions earned on a sale of land it appeared that plaintiff procured a purchaser who entered into a contract to buy, plaintiff notified the owner thereof by telegram the following day, the owner had listed his land with another broker, who secured from a third person a written contract to buy a part of the land. *Held*, that unless the owner received the telegram before signing the contract of sale with the third person, plaintiff could not recover commissions. *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103; *Weisels-Gerhart R. E. Co. v. Wainwright*, 127 Mo. App. 514, 105 S. W. 1096.

PART II.
OPTIONS, SALES, EXCHANGES,
LEASES, LOANS, ETC.

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CHAPTER I.

OPTIONS.

Sec. 82. Exclusive contract to sell and take all over net price, an agency and not an option.

A contract providing that C should have the exclusive sale of K's land for sixty days at a sum named, commissions to be obtained above that sum, makes C the agent of K, and does not give him an option to purchase the land at the price named. *Chesum v. Kreigbaum*, 4 Wash. 680, 30 P. 1098; *Tate v. Aitken*, 5 Cal. App. 505, 90 P. 836; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Arnold v. Nat. Bk. Waupaca*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580. Compare Sec. 88.

Sec. 83. Broker employed to secure an option entitled to reasonable compensation.

A broker employed, not to purchase property but simply to procure an option, and whose employer does not avail himself of the services to make a purchase, is entitled only to reasonable compensation, and not to the same compensation to which he would have been entitled had he been employed to purchase the property. *Boardman v. Hanks*, 185 Mass. 555, 70 N. E. 1012.

Sec. 84. Option, subject to revocation, makes principal liable to broker on finding a purchaser.

Though the owner was at liberty under the agreement to sell the property himself, the mere fact that he had given a prospective purchaser an option on the property, subject to revocation by either party at any time, did not relieve the principal of liability for a commission if the broker during the time given him found a customer able, ready and willing

to buy on the owner's terms. *York v. Nash*, 42 Oregon, 321, 71 P. 59.

Sec. 85. Broker employed to effect a sale, who secures a mere option, is not entitled to commissions.

A broker employed to find an absolute purchaser at a specified price, on terms agreeable to the seller, has not earned a commission by procuring a person who is willing to execute a contract by which it is optional with him to make the payments specified therein, and on his failure to do so the contract to become void and he merely to forfeit the amount, if any paid. *Tousey v. Etzel*, 9 Utah, 329, 34 P. 291; *Hildenbrand v. Lillis*, 10 Cal. App. 522, 51 P. 1008; *Brown v. Kegan*, 32 Colo. 463, 76 P. 1056; *Fox v. Denargo Ld. Co.*, 37 Colo. 203, 86 P. 344; *Block v. Ryan*, 4 App. Cas. (D. C.) 283; *Lawrence v. Rhodes*, 188 Ill. 96, 58 N. E. 910; *Aigler v. Carpenter Pl. Ld. Co.*, 51 Kan. 718, 33 P. 593; *Kimberly v. Henderson*, 29 Md. 512; *Brown v. Wasner* (Wash. Sup. '09), 99 P. 581; *Herman v. Fisher*, 82 Mich. 208, 46 N. W. 225; *Zeidler v. Walker*, 41 Mo. App. 118; *Stengel v. Sergeant* (N. J. Ch. '08), 68 A. 1106; *Runyon v. Wilkinson*, 57 N. J. L. 420, 31 A. 390; *Ward v. Zborowski*, 63 N. Y. S. 219, 31 Misc. 66; *Walsh v. Gay*, 63 N. Y. S. 543, 49 App. Div. 50; *Bennett v. Egan*, 23 N. Y. S. 154, 3 Misc. 421; *Levy v. Kottman*, 32 N. Y. S. 241, 11 Misc. 372; *Blakely v. Pursell*, 90 N. Y. S. 337; *Milstein v. Loring*, 92 N. Y. S. 417, 102 A. D. 349; *Hough v. Baldwin*, 103 N. Y. S. 133, 53 Misc. 284; *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593; *Runck v. Dimmick* (Tex. Civ. App. '08), 111 S. W. 779; *Lawrence v. Peterson*, 34 Wash. 1, 74 P. 1011; *Dwyer v. Raborn*, 6 Wash. 213, 33 P. 350; *Wilson v. Ellis* (Tex. Civ. App. '08), 106 S. W. 1152 See also Sec. 90.

Sec. 86. Broker entitled to commissions where customer exercises option by purchasing the property.

On the customer exercising his option by purchasing the property the broker's commission is due. *De Wolf v. Wis. Lake Ice & Cartage Co.* (Wis. Sup. '10), 124 N. W. 297;

Block v. Ryan, 4 App. Cas. (D. C.) 283; *Aigler v. Carpenter Pl. Land Co.*, 51 Kan. 718, 33 P. 593; *Kimberly v. Henderson*, 29 Md. 512; *Walsh v. Gay*, 63 N. Y. S. 543, 49 App. Div. 50; *Lawrence v. Peterson*, 34 Wash. 1, 74 P. 1011; *Morson v. Burnside*, 31 Ont. (Can.) 438.

Sec. 87. Where principal held only an option at time of sale does not defeat broker's right to commissions.

The fact that the principal does not own the property which he employs the broker to sell, does not defeat the broker's right to compensation on procuring a purchaser. *Smith v. Schiele*, 93 Cal. 144, 28 P. 857. Compare Secs. 122, 154, 180. Where, at the time of the contract of employment, the principal has only an option on the land, or for any other reason can not avail himself of the offer procured by the broker. *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793.

Sec. 88. Broker who took an option not agent of the owner to negotiate a sale.

A real estate broker who took an option to purchase certain real estate at a stated price is not the agent of the owner for negotiating its sale. *Southack v. Lane*, 65 N. Y. S. 629, 32 Mis. 141. Compare Sec. 82.

Sec. 89. Exercise of option to purchase revokes contract of agency to sell land.

A contract of agency for the sale of land is revoked by notice of the exercise of an option to purchase subsequently given. *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. R. 243, 80 S. W. 1171.

Sec. 90. Agreement to sell, cash on delivery of deed, etc., a mere option and not a contract of sale.

An agreement to sell realty "cash on delivery of deed, or one-half on time if terms can be agreed on," is a mere option and not a contract of sale. *Wallace v. Figone*, 107 Mo. App. 362, 81 S. W. 492; *Ind. & Ark. L. & M. Co. v. Pharr*, 82 Ark. 573, 102 S. W. 686. See also Sec. 85.

Sec. 91. A sale of land by the owner, subject to option, does not constitute a breach of contract.

If during the continuance of the option given to a real estate broker, the owner bargains the property to a third party contingent on the failure of the option holder to comply with the terms of the option, does not alone constitute a breach of the option by the owner. *Smith v. Lawrence*, 98 Me. 92, 56 A. 455.

Sec. 92. Where broker sent owner the form of an option, which he executed, on sale broker not entitled to commission.

Where a broker sent the owner of real estate a form of a purchase option, which the owner executed and a sale took place under the option, the broker was not entitled to recover commissions from the owner, as the transaction did not amount to an employment. *Davenport v. Corbett*, 98 N. Y. S. 403, 112 App. Div. 382. See also Sec. 104.

Sec. 93. Broker to procure a lessee not entitled to commissions for an option.

A paper signed by a principal and a proposed tenant stipulated, "We agree to execute a lease of certain premises to such tenant" from October or November, 1906, for seven years, at a rental of \$18,000 per year, the lease as to conditions to be an exact copy of the lease we now hold on the above premises "(by the conditions it means taxes, insurance, if in lease)" the running expense, etc., included; it is understood that at signing of lease six months' rent in advance is to be paid "by the tenant," this to draw six per cent. yearly in advance, principals to secure the proposed tenant for above amount by assignment of lease of the premises now existing, provided this can be done, or other security, lease to be executed on or before October 10, 1902. *Held*, that the instrument was a mere option, in no way obligating the proposed tenant, and the procuring of his signature thereto was not a compliance on the broker's part with a contract between the broker and his principal whereby the broker was to become entitled to a certain commission for procuring a tenant as

such lessee of the premises in question, in which the principal had a leasehold interest. *Benedict v. Pincus*, 95 N. Y. S. 1042, 109 App. Div. 20; *Laws & Bradford v. Schmidt*, 80 Ohio St. 108, 88 N. E. 319.

Sec. 94. On concluding an option for whole tract, owner justified in refusing offer for part.

Where plaintiff, pursuant to her employment to sell certain land for defendant, produced a purchaser who was willing to take an option on the land, defendants were justified in refusing to consider the proposition of another customer for a portion of the land furnished by plaintiff until the negotiations pending with the first customer were terminated. *Fox v. Denargo Land Co.*, 37 Colo. 203, 86 P. 344.

Sec. 95. Parties taking options at liberty to withdraw before contract, and no commissions are earned.

Where the owner of certain land was willing to give a purchaser procured by plaintiff the privilege of buying, and the purchaser was willing to take an option, it would be presumed that the parties were negotiating for a written agreement; hence, neither party was at liberty to withdraw any proposition made during the negotiations and to repudiate any oral agreement before the execution of the written contract, without the owner being liable to the broker furnishing such purchaser for commissions in case of the failure of the parties to agree. *Fox v. Denargo Land Co.*, 37 Colo. 203, 86 P. 344; *Smith v. Merrill*, 134 Wis. 227, 114 N. W. 508. See also Meeting of Minds, Sec. 33.

Sec. 96. When option was exercised broker was entitled to commissions, although paid for reselling lease.

Plaintiff engaged by defendant to sell found no customer, but found a person who would take a lease with an option to purchase, and defendant agreed to this, and paid plaintiff a commission on the lease, and agreed to pay a commission on a sale, if the option was exercised. *Held*, that plaintiff was not deprived of his right to commissions from defendant for the sale on the option being exercised, because after the exe-

cution of the lease and option he found a purchaser for the lease and received a commission from his principal. *Davis v. Weber*, 92 N. Y. S. 823, 46 Misc. 590.

Sec. 97. Contract of exchange contingent on encroachments not defeating was a mere option.

In an action by a real estate broker for commissions for effecting an exchange of defendant's property, evidence that at or about the time of the signing of the contract of exchange, which stipulated that if the other party thereto rejected defendant's title, on the ground of bay-window or stoop-ledge encroachments, his deposit should be returned in full of all claims, plaintiff signed a writing wherein he agreed to wait for his commissions until after the title closed, was evidence tending to show that plaintiff, as well as defendant, regarded the contract of exchange as a mere option, and not an absolute, enforceable contract of exchange. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546. See Sec. 95.

Sec. 98. Co-agent not bound by an option neither given nor ratified by himself.

A co-agent under a power to sell is not bound by an unauthorized option not given or ratified by himself, and, if he purchase the land for himself, can not be held as a trustee for the claimant under the option. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. R. 977.

Sec. 99. Option and title bond taken by agent to insure sale, do not affect relationship of agency.

Real estate agents who take from the owner of lands listed with them for sale, an option and title bond to make certain that, if a sale is effected, it will be carried out without obstruction, are still agents, so that the principal is liable for their fraud. *Alger v. Anderson*, 78 Fed. 729.

Sec. 100. Option at best price obtainable means satisfactory to purchaser.

A contract of employment to obtain options on property stated that the options should be at a price at which the party for whom they were purchased "may buy." *Held*, that the

intent of the parties was that the option obtained should be at a price which was satisfactory to the purchasers, and if shown to be so, the conditions of the contract were fully complied with. *Worthington v. McGarry*, 149 Ala. 251, 42 S. 988.

Sec. 101. Option unexercised, subsequent sale to party by administrator, broker not entitled to commissions.

A broker who finds a person who takes an option on the purchase of certain mining property, which is not carried out, can not, where the owner dies before the option expires, recover his agreed commissions from the administrator, where the latter, after the expiration of the option, sells the property to the same person at the same price, even though the negotiations conducted by the broker prior to the owner's death may have contributed to the accomplishment of the sale. *Crowe v. Trickey*, 204 U. S. 228, affirming *Trickey v. Crowe* (Ari. Sup.), 71 P. 965; *Crowe v. Harmon*, 204 U. S. 241, affirming *Harmon v. Crowe* (Ari. Sup.), 71 P. 1125. See also Sec. 199.

Sec. 102. Broker to secure two options, principal tells him not to act as to one, breach of contract.

Where a party under a contract is to secure for a second party options on certain properties, and the second party directs him not to proceed in reference to securing an option on one of the properties, this is a breach of the contract for which the second party is liable in damages. *Worthington v. McGarry*, 149 Ala. 251, 42 So. 988.

Sec. 103. Broker not entitled to compensation for securing part of options.

Plaintiff and defendant entered into a contract whereby defendant agreed to pay plaintiff a certain sum if the plaintiff should secure certain options on ore land and on a majority of the stock of a corporation; plaintiff secured the options except as to the stock of the corporation. *Held*, that plaintiff is not entitled to compensation under the contract for securing the ore option, by alleging and proving that he was prevented by defendant from endeavoring to obtain the other. *Id.*

Sec. 104. Broker obtaining price from owner, amounts only to a naked, verbal option.

Where a broker asks and obtains from the owner the price at which he would sell real property, without anything being said as to the broker's employment or compensation, and it does not appear that the owner knew, or had reasonable grounds to believe, that the broker expected to be paid, no contract of employment, express or implied, can be inferred, but at best only a naked, verbal option. *Clammer v. Eddy*, 41 Colo. 235, 92 P. 722. See also Sec. 92.

Sec. 105. Option given and extended,, broker held as acting in the character of a purchaser.

In an action by a broker for commissions in procuring a purchaser of timber lands, it appeared that the broker, on learning that the property was for sale, looked it over at different times, and had an interview with the owner as to the price; that thereafter, he wrote a letter to the owner requesting him not to let any outsider know about the price for a time; that the owner replied that he would give the broker an option on the price and conditions named until a specified time; this option was extended. *Held*, not to show that the broker was acting in the sale as a broker of the owner, but in the character of a purchaser. *Wood v. Palmer*, 151 Mich. 30, 115 N. W. 242, 14 Det. L. N. 963; *Harten v. Loeffler*, 31 App. D. C. 362.

Sec. 106. Error to prevent defendant showing how option was finally made to purchaser.

Where, in an action by a real estate broker to recover commissions for finding a purchaser, defendant claimed that the sale was made through the efforts of another, it was error to sustain an objection to a question to defendant by his counsel, as to the circumstances under which the option was finally made to the purchaser. *Grieb v. Koeffler*, 127 Wis. 314, 106 N. W. 113.

Sec. 107. Defendants giving broker option, estopped to say they procured his customer to buy.

Where defendants gave plaintiff an option to effect a sale of coal property, if sold within a certain time, on a stipulated

commission, and agreed to assist plaintiff in the sale thereof, defendants will not be heard to say that a sale to one with whom plaintiff was negotiating, made during the continuance of the option, was the result of their independent efforts. *Wells v. Hocking Valley Coal Co.*, 137 Iowa, 526, 114 N. W. 1076.

Sec. 108. Defendant may show purchaser took an option, and did not intend to buy unless he secured adjoining lot.

In an action by a broker to recover commissions for making a sale of realty defendant may show that plaintiff knew that the purchaser presented by him simply obtained an option, and did not intend to buy unless he purchased some adjoining lots. *Walsh v. Gay*, 63 N. Y. S. 543, 49 App. Div. 50.

Sec. 109. Option as only agreement, what owner may show to corroborate that claim.

Where, in a suit for a commission for finding a purchaser for land, plaintiff alleged that the owner listed it with brokers, who listed it with plaintiff's firm, with the owner's consent, the owner could show that shortly before the alleged listing with such broker, he gave them an option to purchase a tract, including the land on account of which the commission was claimed, as tending to corroborate the owner's claim that the option contract was the only agreement between him and the broker. *Sterling v. De Laune* (Tex. Civ. App. '07), 105 S. W. 1169.

Sec. 110. Option held not expired when sale was made by owner.

In an action by a broker to recover commissions on a sale of land, evidence held to support a finding that an option authorizing plaintiff to sell the land, had not expired before the sale. *Holbrook-Blackwelder, R. E. & T. Co. v. Hartman*, 128 Mo. App. 228, 106 S. W. 1115.

Sec. 111. Error to grant new trial to permit setting up the exercise of an option.

Where, in an action for a broker's services in the sale of a mine, a non-suit was granted, by reason of the fact that an

option to purchase negotiated by the broker had not matured when suit was brought, and pending a motion for a new trial for alleged errors of law occurring at the trial, the purchaser complied with the option and completed the sale, it was error to grant a subsequent application for a new trial in order to permit the broker to allege by amendment the completion of the sale and recover for his services. *Lawrence v. Peterson*, 34 Wash. 1, 74 P. 1011.

CHAPTER II.

SALES OF REAL ESTATE.

Sec. 112. If employment does not state terms of sale satisfactory to principal implied.

A real estate broker is not entitled to commissions for the sale of land unless he procures a purchaser who is able, ready and willing to complete a purchase on terms named, or which are, in the absence of an express agreement as to terms, satisfactory and agreeable to the owner. *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Montgomery v. Knickerbocker*, 50 N. Y. S. 128, 27 N. Y. App. D. 117.

Sec. 113. A broker who effects a sale according to the terms of the employment is entitled to compensation.

Where property is placed with a broker for sale, he is not bound to consummate a sale or procure a purchaser upon the agreed terms, but when he does either his commission is earned. *Walsh v. Hastings*, 20 Colo. 243, 38 P. 324; *Gilmore v. Bailey*, 103 Ill. App. 245; *Stephens v. Scott*, 43 Kan. 285, 23 P. 555; *Dreisbach v. Rollins*, 39 Kan. 268, 18 P. 187; *Locke v. Griswold*, 96 Mo. App. 527, 70 S. W. 400; *Pollard v. Banks*, 67 Mo. App. 187; *Crowley Co. v. Myers*, 69 N. J. L. 245; 55 A. 305; *Brundage v. McCormick*, 23 N. Y. S. 262, 69 Hun, 65; *McCaffrey v. Page*, 20 Pa. Super. Ct. 400; *Jordan v. Snyhenry*, (Iowa Sup. '09), 123 N. W. 956. See Unilateral Contracts, Sec. 20.

Sec. 114. A contract of sale may be established by circumstantial evidence.

Circumstantial evidence may be sufficient to establish a contract of sale when no objection is made to the competency of any portion of it. *Chapin v. Bridges*, 116 Mass. 105.

Sec. 115. A judicial sale producing increased price entitled broker to more commissions.

Where land is bought at a judicial sale for a nominal sum by a third person who, pursuant to a guaranty made to the receiver pays a much larger sum for the property, the broker is entitled to commissions on said larger sum. *Peters v. Anderson*, 23 S. E. 754, 88 Va. 1051. Compare Sec. 859.

Sec. 116. Broker not entitled to commissions for making a nominal sale.

A broker employed to sell property is not entitled to a commission where the transaction so far as it was effected by him did not amount to a sale. *Viaux v. Old South Soc.*, 133 Mass. 1, 10; *Cosgrove v. Leonard Mer., etc., Co.*, 175 Mo. 100, 74 S. W. 986; *Johnson v. Sirret*, 153 N. Y. 51, 46 N. E. 1035; *Terry v. Wilson*, 50 Minn. 570, 52 N. W. 973.

Sec. 117. Contract of sale signed by purchaser prima facie evidence of readiness to buy.

A contract of sale signed by a purchaser, unilateral when tendered to the vendor, is *prima facie* evidence of the purchaser's readiness and willingness to buy. *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326.

Sec. 118. An enjoined sale does not deprive the broker of commissions earned.

A broker employed to sell real estate has discharged his duty when he produces a purchaser able and willing to buy upon the terms and at the price fixed by the seller, regardless of whether the sale is ever actually consummated or not, provided the failure is not due to some fault of the broker, and even although the sale is afterwards enjoined. *Gibson v. Gray*, 17 Tex. C. Ap. 646, 43 S. W. 922.

Sec. 119. Broker employed to effect a sale not entitled to compensation until consummated.

In an action to recover the agreed compensation to be paid on the making of a sale or disposition of the property, a broker

is not entitled to recover for merely finding a purchaser, when he failed to consummate a sale. *Dorrington v. Powell*, 52 Neb. 440, 72 N. W. 587; *Lyle v. Uni. Land & Inv. Co.* (Tex. Civ. App. 95), 30 S. W. 726; see also Secs. 193, 224, 272, 449; *Pfanz v. Humburg*, 820 St. 1.

Sec. 120. The withdrawal of land from sale entitled broker, under the contract, to commissions.

By the terms of the contract of employment between the owner of land and a broker commissions became due upon withdrawal of the property from sale within a certain time. *Held*, that the notice recited that it was given under a contract by the owner to the broker not to sell said land, that it had been withdrawn from the market, written within that time, while the owner was repudiating a sale by the broker, was a withdrawal of the premises from sale entitling the broker to his commissions, not as damages for breach of contract, but as a debt. *Maze v. Gordon*, 96 Cal. 61, 30 P. 962; compare Sec. 585.

Sec. 121. Transaction whereby properties are given for others and cash difference is a sale.

A transaction by which certain pieces of property are given for others, a definite price being put on each and the difference paid in cash, is a sale and not an exchange. *Thornton v. Moody*, (Tex. Civ. App. 93), 24 S. W. 331; *Ullman v. Land*, 37 Tex. Civ. App. 422; 84 S. W. 294.

Sec. 122. Sale miscarrying through no fault of principal, broker not entitled to commissions.

Where the owner of land authorized real estate agents to sell land purchased by him, and informed them that he had no deed for the same, but held it under a contract, and the agents made a contract for the sale of the land, but the purchaser refused to complete, because the vendor had only a contract of purchase, there being no other defect in the title, it was held that the agents were not entitled to recover the agreed commissions on the sale, as it proved abortive without any fault on the part of their principal. *Hoyt v. Shipherd*, 70 Ill. 309; compare Sec. 87.

Sec. 123. Sale by wrong description bars broker's right to commissions.

A real estate broker authorized to sell a tract of land spoken of by the owner as being his land on a certain canal, has no authority to sell it by any other description than that by which it was purchased by the owner, and the broker's commissions are not earned where the trade falls through because the contract made by the broker with the intending purchaser described the tract as containing a stated number of acres south of the canal, whereas it was described in the conveyance to the owner as being that number of acres south of the center of the canal. *Ward v. Lawrence*, 70 Ill. 295.

Sec. 124. A single sale of real estate not doing business to require a license.

One who, while engaged in other business, sells land for another, may recover his commissions, though he had not taken out a license as required of real estate agents, since a single sale does not constitute the exercise of the business of real estate brokerage. *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124; *Black v. Snook*, 204 Pa. St. 119, 53 A. 648; *Yedinsky v. Strouse*, 6 Pa. Super. Ct. 587; 42 W. N. C. 12.

Sec. 125. Owner forced to sell with joint owner deprives broker of commissions.

Where a landowner, who has engaged a real estate agent to sell land at a certain price, is forced to join with a joint owner to effect a sale and sell at a reduced price, the agent is not entitled to commissions. *Buhl v. Noe*, 51 Ill. App. 622.

Sec. 126. Sale by broker, who agrees afterward to resell, not a fraud on seller.

A broker negotiated a sale of plaintiff's land to defendant, who had his deed made out to a third person, who afterwards conveyed to defendant; a few weeks after the sale defendant agreed to let the broker sell the land for him at an advance, the profits to be equally divided between them; plaintiff did not know at the time of the sale that defendant was the purchaser, and there was then no arrangement or understanding money to be paid on the execution of the deed, but further

between defendant and the broker as to any resale of the property or division of the profits. *Held*, that there was nothing in the transaction in fraud of plaintiff. *Glover v. Layton*, 145 Ill. 92, 34 N. E. 53.

Sec. 127. Sale ineffectual where broker had no authority to make it.

In a suit for specific performance of a contract by C. as agent of defendant to convey certain lots, it appeared that the lots were situate in D., where such agent resided; that on March 30, 1889, defendant wrote the agent: "I will be in D. last of April or first of May, wish you would have a purchaser; think I ought to get \$17,000, as there is quite a boom in D. in real estate;" that on April 20th the agent telegraphed defendant: "Lots sold for \$16,000 cash, mail you deed for signing to-day;" to which defendant replied: "Won't sell for less than \$17,000; be there May 1st;" on May 3d, the date of her arrival in D., the agent telegraphed her: "Sold property for \$17,000 * * * 27th of April;" but she did not receive the telegram until she had reached D. and repudiated the contract; held that the agent had no authority to sell the property. *Sullivan v. Leer*, 29 P. 817, 2 Colo. App. 141.

Sec. 128. Advertisement on land as for sale by agent insufficient to imply right to sell.

An advertisement put up upon land offering it for sale, and referring to the owner and another person, is not, in opposition to a denial by the owner of the agency of such third person, sufficient to imply in him power to make a sale of the land. *Mortimer v. Cornwell*, 1 Hoffm. (N. Y.) Ch. 351.

Sec. 129. Authority to a broker to find a purchaser gives no right to make a sale.

A letter to an agent saying: "As you stated you could get \$30,000 for the place you occupy * * * and if you can, we will sell at that price * * * and allow you 2½ per cent. on said price," merely authorized the agent to find a purchaser, but not to sell, and a contract by the agent to sell confers no right on the purchaser. *Grant v. Ede*, 85 Cal. 418, 24 P. 890; *Sim-*

mons v. Kramer, 13 S. E. 902, 88 Va. 411; *Lawson v. King* (Wash. Sup. '09), 104 P. 1118.

Sec. 130. Where agent buys at inadequate price, by fraud, contract of sale will be set aside.

Where an agent purchases property at a grossly inadequate price, by the concealment of facts and information relating thereto which he was bound to disclose, the sale will be set aside. *Norris v. Taylor*, 49 Ill. 17. See also Sec. 291.

Sec. 131. Agent becoming purchaser unknown to principal, sale will be set aside.

Where an agent becomes the purchaser, without the knowledge of the principal, the sale will be set aside. *Fisher's Appeal*, 34 Pa. St. 29; *Butler v. Haskill*, 4 Desau. (S. C.) 651; *Casey v. Casey*, 14 Ill. 112. See also Sec. 314.

Sec. 132. Contract to pay a broker a commission on accepted sale, though no effort required, upheld.

A contract to pay a broker a commission on any accepted sale procured by him will support a recovery for such commission, though it does not bind the broker to make any effort to sell. *Brooks v. Leathers*, 112 Mich. 463, 70 N. W. 1099. Compare Secs. 552, 585.

Sec. 133. Contract may require broker in order to earn commissions to effect a sale at the price limited.

It is clearly competent for the owner and broker to agree that the latter shall have no compensation unless he shall effect a sale at the price limited, and the broker would be bound by such a contract. *Hungerford v. Hicks*, 39 Conn. 259. See also Sec. 61.

Sec. 134. Sale at \$350, when contract limited to \$400, did not entitle broker to commissions.

In an action for commissions for effecting a sale of a house for defendant, it appeared that defendant agreed to give plaintiff \$75 if he should sell the house for \$500 before a cer-

tain day, and \$50 if he should sell it for \$400 after that time; plaintiff introduced to defendant a purchaser who, after the day specified, purchased the house for \$350. *Held*, that a judgment for plaintiff for \$35 was not sustained by the evidence. *Blackwell v. Adams*, 28 Mo. App. 61; *Holbrook v. McCarthy*, 61 Cal. 216.

Sec. 135. Sale by broker at \$1,500, after he said he could not and asked lower terms, unauthorized.

Where an agent authorized to sell for \$1,500, if at once, stated he could not and asked for lower terms, and after a month with no other authority, he sold for \$1,500, the sale was unauthorized. *Matthews v. Soule*, 12 Neb. 398.

Sec. 136. Without a special contract, broker to find a purchaser requires a sale to be entitled to commissions.

A real estate broker employed by the owner, without any special agreement, to find a purchaser, is not entitled to claim commissions upon the price, although he finds a person willing to purchase upon the terms fixed, unless the owner accepts the purchaser and an actual sale is effected; *Pratt v. Patterson*, 7 Phila. (Pa.) 135. *Affirmed* 112 Pa. St., 475; this is contrary to the prevailing doctrine. *Walsh v. Hastings*, 20 Colo. 243, 38 P. 324; *Gilmore v. Bailey*, 103 Ill. App. 245; *Stephens v. Scott*, 43 Kan. 285, 23 P. 555; *Dreisbach v. Rollins*, 39 Kan. 268, 18 P. 187; *Locke v. Griswold*, 96 Mo. App. 527, 70 S. W. 400; *Pollard v. Banks*, 67 Mo. App. 187; *Crowley Co. v. Meyers*, 69 N. J. L. 245, 55 A. 305; *Brumdage v. McCormick*, 23 N. Y. S. 262, 69 Hun, 65.

Sec. 137. Sale by one of rival brokers puts an end to contract with the others.

Owners of property often leave it for sale with several different brokers at the same time; in such cases the several brokers have concurrent authority to sell, but a sale by one of them, with the knowledge of the others, puts an end to the agency of the others by removing the subject matter of the agency; since they can have no further power than their principal has, and he having, by his agent, once sold the property

to one person, can not rightfully sell it again to another. *Cushman v. Glover*, 11 Ill. 600. See also Sec. 15.

Sec. 138. Whether agent was to be paid commissions on both auction and private sales question for the jury.

The court properly charged that as there are different kinds of sales of lands, and the contract does not specify the kind, it is for the jury to determine from the evidence and the letters forming the contract, and the attending circumstances, as to whether it included only auction sales, or both auction and private sales, for which plaintiff was to receive commissions. *Cooligan v. Milwaukee & Sault Ste. M. Im. Co.*, 79 Wis. 471, 48 N. W. 717.

Sec. 139. Sale by agent of property acquired from principal liable to latter for profits.

Where a real estate agent makes a purchase of land of his principal, without his knowledge, using a third party as a medium through whom to secure a deed, and then sells the property at an advance, he will be held accountable to the owner for the profits realized. *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116; *Krhut v. Phares*, 80 Kan. 515, 103 P. 117; *Mechem on Ag.* 469.

Sec. 140. Sale without written authority excepted from the operation of the statute as to employment of brokers.

Where, in an action by a broker for commission on a sale of real estate, defendant's answer admitted the employment of plaintiff as a broker, and it appeared that the contract of exchange of properties negotiated by plaintiff was signed through his efforts, these facts took the case out of the purview of the penal act, making it a misdemeanor for one to offer real estate for sale without written authority. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546.

Sec. 141. Sale by second agent to client of first, at lower price, latter not entitled to commissions.

A real estate agent employed to sell for a specific price is not entitled to his compensation on production of a person to whom the property is sold by another agent at a lower price.

Wolff v. Rosenberg, 67 Mo. App. 403; *Armes v. Cameron*, 19 D. C. 435; *Carlson v. Nathan*, 43 Ill. App. 364; *Means v. Stone*, 44 Ill. App. 444; *Livezy v. Miller*, 61 Md. 336; *Crowningshield v. Foster*, 169 Mass. 237, 47 N. E. 879; *Chandler v. Sutton*, 5 Daly (N. Y.) 112; *Powell v. Anderson*, 15 Daly 219, 4 N. Y. S. 706; *De Zavola v. Rozaliner*, 84 N. Y. S. 969; *Friedman v. Havemyer*, 56 N. Y. S. 97, 37 App. Div. 518; *Felman v. O'Brien*, 51 N. Y. S. 309, 23 Misc. 341; *Hendricks v. Daniels*, 19 N. Y. S. 414; *Powell v. Lamb*, 1 N. Y. S. 431; *Land Mtge. Bk. v. Hargis*, (Tex. Civ. App. '02), 70 S. W. 352. See also Secs. 408, 422.

Sec. 142. Sale by owner before a sale by agent bars commissions.

An owner of land was solicited by plaintiffs to place it in their hands for sale, and wrote that he must have a certain fixed price for the land, and that plaintiffs could have all they could get over and above that; plaintiffs found a purchaser, but did not notify the owner until he had sold to another person. *Held*, that the plaintiffs were not entitled to a commission. *Helling v. Darby*, 71 Kan. 107, 79 P. 1073; *Hodge v. Appellees*, 107 N. Y. S. 170, 122 App. Div. 437; *Ettinghoff v. Harovitz*, 100 N. Y. S. 1002, 115 App. Div. 571. See also Sec. 15. *English v. Wm. George Realty Co.* (T. C. A. '09), 117 S. W. 996.

Sec. 143. Where vendor and customer disagree as to terms of sale, and broker acquiesces, bars commissions.

A real estate agent is not entitled to commissions for a sale of land, where, before the completion of the sale the parties disagree as to terms, and the transaction is considered at an end, if the agent acquiesces in such rescission of the contract, though the owner subsequently places it in the hands of another agent who sells it on practically the same terms to the purchasers secured by the first agent, unless fraud or bad faith be shown. *Girardieu v. Gibson*, 122 Ga. 313, 50 S. E. 91.

Sec. 144. Sale for cash is complied with by broker selling to be paid on execution of deed.

Where the terms of a contract between the owner of land and a broker who was to procure a purchaser, required a cash

provided that if the owner desired to retain possession for a time he could do so by paying interest on the money, a cash sale was provided for. *Fisher v. Bell*, 91 Ind. 243.

Sec. 145. Broker selling contract of sale, vendee refusing to assign, entitled to commissions.

Where plaintiffs were employed as brokers to sell a contract for the sale of real estate at a profit of \$1,000 net to their clients, and they produced a purchaser ready, able and willing to take the contract on the terms prescribed, but defendant refused to assign the same, and sold it to another, plaintiffs performed their obligations and were entitled to recover commissions. *Levy v. Trimble*, 94 N. Y. S. 3, 47 Misc. 394.

Sec. 146. Sale of public land, broker to recover commissions must show he effected attendance of purchaser.

Where a real estate broker claims compensation for securing the attendance of a purchaser at a public land sale, he must at least show he had some effect upon the purchaser's attendance. *Perkins v. Underhill*, 103 N. Y. S. 25, 118 App. Div. 170.

Sec. 147. Plaintiff to plat and sell, and pay \$150 an acre to defendant, was a contract for the sale of lands.

A contract whereby defendant agreed to sell plaintiff, or his assigns, certain lands for \$150 per acre, plaintiff to plat the land and sell it, and to pay the proceeds to defendant until the latter had received \$150 per acre, was a contract for the sale of lands, not a mere brokerage contract which defendant had a right to forfeit by reason of non-performance. *Whipple v. Lee*, 46 Wash. 266, 89 P. 712.

Sec. 148. Broker failing to sell, and owner by reducing price selling to customer, not entitled to commissions.

Where a broker's efforts to procure a purchaser fail, because of the purchaser's refusal to purchase on the terms fixed by the broker, and the negotiations between them are broken, the fact that the owner subsequently negotiated with the customer and effected a sale to him in consequence of modifying the terms thereof, does not entitle the broker to commissions. *Schaus v. Storch*, 107 N. Y. S. 26, 56 Misc. 484.

CHAPTER III.

EXCHANGES OF REAL ESTATE.

Sec. 149. In estimating commissions on an exchange, the actual and not the trade value is the basis.

In estimating the commissions for a sale of real estate, where part of the price was paid in town lots, the actual and not the trade value of the property should be considered. *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Porter v. Hollingsworth*, 62 N. Y. S. 796, 30 Misc. 628; *Colland v. Trepel*, 70 Ill. App. 228; *Davidson v. Wills* (Tex. Civ. App. '06), 96 S. W. 634. See also Sec. 185.

Sec. 150. Broker to effect exchange ordinarily entitled to commissions on execution of contract therefor.

A broker employed to effect an exchange of land ordinarily becomes entitled to a commission upon the execution of a contract therefor. *Blaydos v. Adams*, 35 Mo. App. 526; *Shanks v. Michael*, 4 Cal. App. 553, 88 P. 596. See also Sec. 186.

Sec. 151. Broker may recover commissions for effecting an exchange though property received not discussed in the negotiations.

Where a vendor employs a broker to bring about an exchange of realty, and the broker brings the owner and another together, he may recover his commissions on an exchange, although the property received was not that under discussion when the broker last appeared in the negotiations. *French v. McKay*, 181 Mass. 485, 63 N. E. 1068.

Sec. 152. Where principal receives good title to property conveyed can not defeat broker's commissions for exchange.

Where the principal in an exchange of property actually receives a good title to the property conveyed to him, he can

not defeat an action by his broker for commissions on the ground that his contract to sell was invalid. *Schlevinger v. Jud*, 70 N. Y. S. 616, 61 App. Div. 453.

Sec. 153. Broker supplying person willing to exchange must show customer able before he can recover commissions.

A real estate agent who finds a purchaser on the terms fixed by the owner of the property, such purchaser being ready, willing and able to take a conveyance and pay the purchase price, has earned his commissions; the fact that the contract involved an exchange of lands, does not change the rule announced. *Herscher v. Wells*, 103 Ill. App. 418; *Moskowitz v. Hornberger*, 38 N. Y. S. 114, 15 Misc. 645; *Freedman v. Gordon*, 4 Colo. App. 343, 35 P. 879.

Sec. 154. That customer does not own property offered, no ground for principal's refusal, where he has a contract for the purchase of the land to exchange.

Although the customer does not own the fee of the property offered by him, this is insufficient ground for the principal's refusal to make the exchange, where the customer has a contract for the purchase of the property, and is ready and willing to carry out the agreement. *Bauman v. Nevins*, 65 N. Y. S. 84, 52 App. Div. 290. See also Sec. 87.

Sec. 155. That land was conveyed to customer in fraud of grantor's creditors no ground for refusal to exchange.

The fact that the land was conveyed to the customer in fraud of his grantor's creditors, where such grantor had an absolute title, is no ground for the principal's refusal to complete the exchange, where the creditors have not impeached the conveyance. *Mason v. Hinds*, 19 N. Y. S. 996. In another case the contrary doctrine was sustained. *Moskowitz v. Hornberger*, 46 N. Y. S. 462, 20 Misc. 558.

Sec. 156. To recover commissions for an exchange which fails by defect in customer's title, the broker must have acted in good faith.

To entitle a broker to a commission, where the exchange fails through because of a defect in the customer's title, the broker

must have acted in good faith. *Carnes v. Howard*, 180 Mass. 569, 63 N. E. 122; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152; *Rockwell v. Newton*, 44 Conn. 333.

Sec. 157. Broker does not earn commissions for an exchange by producing an irresponsible customer.

A broker employed to carry out an exchange of lands does not earn his commissions, where he brings to his employer a person who assumes to contract as owner, although he is not, of which fact the broker knows, and within the few days allowed for performance proves unable to perform his contract and is irresponsible. *Burnham v. Upton*, 174 Mass. 408, 54 N. E. 873; *Norman v. Reuther*, 54 N. Y. S. 152, 25 Misc. 161. See also Sec. 1053b.

Sec. 158. Ability to make exchange does not depend on financial responsibility but on ownership of the property.

The broker must show that the purchaser is able to make the exchange, and this ability is not proved by the mere production of deeds on his part, without some showing that he also had title to the properties he was willing to deed. His ability does not depend upon general financial standing; but upon his being the owner of the land it was proposed to exchange. *Herscher v. Wells*, 103 Ill. App. 418.

Sec. 159. Formal contract to convey property in exchange not sufficient prima facie evidence of title thereto.

The customer's ability is not proved by the mere production of deeds on his part, without some showing that he also had title to the property he was willing to deed. *Herscher v. Wells*, 103 Ill. App. 418. Compare Sec. 161.

Sec. 160. Petition alleging failure to make exchange defective in alleging contract to procure a purchaser.

Where a petition alleges the failure of defendant to make an exchange of property procured by the plaintiff, it was held defective in alleging a contract to procure a purchaser, with an implied contract to pay the reasonable value of the services, consequently there was no breach of contract for which the

defendant was liable in damages to the plaintiff, and the demurrer was properly sustained. *Mulhall v. Bradley, etc., Co.*, 63 N. Y. S. 732, 50 App. Div. 179.

Sec. 161. Deed of conveyance competent to prove exchange.

The defendant having assented to the terms of the written agreement to exchange, the agreement and the deed of conveyance were competent evidence of the sale and the consideration thereof. *Hewitt v. Brown*, 21 Minn. 163; *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994; *Levy v. Coogan*, 9 N. Y. S. 534, 16 Daly 137; *Cannon v. Castleman*, 24 Ind. App. 188, 55 N. E. 111. Compare Sec. 159.

Sec. 162. Participating without employment in an exchange, broker not entitled to commissions.

One participating without employment or authority in a transaction resulting in an exchange of property is not entitled to a commission. *Merrill v. Latham*, 8 Colo. App. 263, 45 P. 524. See also Sec. 17.

Sec. 163. One may recover from party in default in an exchange the commissions paid to the broker.

Where an owner of real estate has contracted to exchange it for property owned by another, whom a broker he employed has produced, the contract providing that the land should be conveyed by each to the other within twenty days by a good and sufficient warranty deed, such owner may recover from the customer the amount of the commissions paid to the broker, where such customer is unable to convey a good title to his property. *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152; *Volke v. Fisk* (N. J. Ch. '09), 72 A. 1011.

Sec. 164. Where pieces of property are given for others and the difference paid in cash, a sale and not an exchange.

A transaction by which certain pieces of property are given for others, a definite price being put on each, and the difference paid in cash, is a sale and not an exchange. *Thornton v. Moody* (Tev. Civ. App. '93), 24 S. W. 331; *Ullman v. Land*, 84 S. W. 294, 37 Tex. Civ. App. 422.

Sec. 165. Broker making exchange, where principal made contract, not responsible for misrepresentations made in good faith.

Where a real estate broker employed to sell land negotiates an exchange for other lands, his principal making the contract, there is no legal duty devolving upon the broker to ascertain correctly the facts affecting the value of the lands received in exchange, and for misrepresentations made to his principal in good faith concerning the same he is not responsible. *Coe v. Ware*, 40 Minn. 404, 42 N. W. 205. See also Sec. 454.

Sec. 166. Error to prevent defendant showing that broker to effect exchange was secretly employed by other party.

In an action by a real estate broker to recover commissions on an exchange of property effected by him, it appearing that plaintiff was in the employ of both parties to the exchange, the court erred in excluding the testimony of the defendant tending to show that it was ignorant of the double employment of plaintiff, of which plaintiff testified that defendant was informed. *Condit v. Sill*, 18 N. Y. S. 97.

Sec. 167. Power to sell land does not include power to lease or exchange it.

A power to sell land does not include the power to lease or exchange it. *Trudo v. Anderson*, 10 Mich. 357; *Lampkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Reese v. Medlock*, 27 Texas 120; *Lucas v. County Rec. Cass Co.*, 75 Neb. 351, 106 N. W. 217.

Sec. 168. Styling himself agent for others in a contract of exchange bound himself.

Where a person in a contract for the exchange of lands styled himself "agent for others," but without stipulating in their names or undertaking to bind them as their agent, it was held that he was named as agent by way of recital only, and that he was personally liable on the contract and entitled to its benefits. *Couch v. Ingersoll*, 2 Pick. (Mass.) 292. See also Sec. 383.

Sec. 169. Exchange made by owner and broker did nothing, latter not entitled to commissions.

A broker can not recover on a contract that he should have commissions for effecting an exchange of property with another, where he did nothing under the contract and does not show that he was excused from rendering services under his employment, although the trade was consummated by the owner. *Walton v. McMorro*, 57 N. Y. S. 691, 39 App. Div. 667. See also Secs. 19, 21.

Sec. 170. Where an exchange was wrongfully broken off by principal, broker entitled to commissions.

Plaintiff employed by defendant to sell or trade certain land for him procured an agreement for a trade with the owner of other lands, but, before the deeds were delivered by the parties, on plaintiff's claiming commissions from agents of defendant, to whom he had meantime given control of all his real estate, they declared the trade "off." *Held*, that plaintiff could recover commissions from defendant if such exchange was so broken off or rescinded by his authority. *Blaydos v. Adams*, 35 Mo. App. 526.

Sec. 171. Meaning of term "net rental" of property received in exchange.

Where a contract between the owner of property and a broker who undertook to bring about an exchange for certain other property, provided that such property should have an annual net rental of a specified sum, it meant that it should yield that amount above all liabilities to the owner, such as taxes, assessments, etc. *McVicker, etc., Realty Co. v. Garth*, 97 N. Y. S. 640, 111 App. Div. 294.

Sec. 172. Broker for compensation has no interest or title in either of the properties exchanged.

A broker bringing about an exchange of properties between the owners thereof, pursuant to an agreement with one of them stipulating that he will pay to the broker certain sums on the signing of a contract, passing of the title, and on a sale of

the acquired land, has no title or interest in either of the properties. *Lindheim v. Cen. Nat. Realty, etc., Co.*, 97 N. Y. S. 619, 111 App. Div. 275; *Mitschen v. Swensen* (Or. Sup. '09), 99 P. 277. See Sec. 16.

Sec. 173. Mere offer by other party to pay broker does not show employment where broker did not accept.

A statement by one party to an exchange of real estate that he had offered to pay the broker employed by the other party a commission does not show that the broker accepted employment by both parties, where he admits the offer, but states that he did not accept it. *Lebowitz v. Colligan*, 45 N. Y. S. 373, 18 App. Div. 624. See Sec. 72.

Sec. 174. Agreement by broker to wait for payment of accrued commissions unsupported by a consideration.

In an action by a broker to recover commissions on an exchange of property effected by him, whether a written agreement by plaintiff to wait for his commissions until title closed, was signed before or after the signing of the contract of exchange was immaterial, where all the terms of the written contract of exchange were fully agreed on, on the preceding day, the subsequent agreement to wait for the accrued commissions being unsupported by a consideration. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546. See also Sec. 19.

Sec. 175. Broker effecting exchange entitled to commissions although terms were changed by the parties.

A broker employed to procure a purchaser for premises at a specified price, part cash, and the balance secured by mortgage, procured a third person to enter into a contract with the husband of the owner for an exchange of the premises for other property; the owner conveyed the premises to the purchaser pursuant to the arrangement. *Held*, that the broker was entitled to his commission, though the transfer was made on other terms than those originally proposed, and though the conveyance was executed after the expiration of the time fixed to procure a purchaser. *Southwick v. Swavienzki*, 99 N. Y. S.

1079, 114 App. Div. 681; *Reid v. McNirney*, 128 Iowa 350, 103 N. W. 1001; *Shanks v. Michael*, 4 Cal. App. 553, 88 P. 596.

Sec. 176. Contract for effecting exchanges held to be severable.

Evidence was held conclusive that a contract by which appellant agreed to pay respondent a commission of one dollar per acre for procuring contemplated exchanges of real estate, was not an entire but a severable contract; the respondent was entitled to his commissions upon effecting one of the contemplated trades, and the court did not err in so instructing the jury. *Goodspeed v. Miller*, 98 Minn. 457, 108 N. W. 817. See also Sec. 496. Compare Sec. 493. Mechem on Ag., Sec. 634.

Sec. 177. Exchange defeated by existence of lease broker not entitled to commissions.

Plaintiff, a real estate broker, secured a customer to take defendant's premises in exchange for his own, and to pay defendant for the difference in the value of the equities; no time was stipulated as to when the exchange should take effect, and a tenant in defendant's premises refused to vacate without the statutory ninety days' notice, and defendant refused to perform unless the purchaser would take subject to the lease; this the latter refused to do, and the transaction was not consummated. *Held*, that since the plaintiff knew of the existence of the lease, he had not perfected a contract for exchange so as to be entitled to the commissions. *Mainhart v. Paerschke*, 65 N. Y. S. 494, 32 Misc. 97; *Low v. Woodbury*, 95 N. Y. S. 326, 107 App. Div. 298.

Sec. 178. Interfering broker not entitled to commissions for effecting an exchange.

A letter containing an offer for certain real estate was sent to the supposed owner thereof, who turned it over to a broker; the latter forwarded it to the real owner, with a letter suggesting that said one was the agent of the one making the offer. *Held*, that the broker was entitled to no commissions on an exchange subsequently effected as a result of the negotiations. *Hamilton v. Gillander*, 49 N. Y. S. 663, 26 App. Div. 156; *Shapiro v. Shapiro*, 103 N. Y. S. 305, 117 App. Div. 817. See Sec. 70.

Sec. 179. Exchange defeated by failure to furnish abstract of title, broker not entitled to commissions.

Plaintiff, employed by defendant to find a purchaser for a stock of goods, found a person who was willing to buy, if real estate which he had was accepted in payment; defendant made a written proposition in which he agreed to accept such real estate in part payment, provided the purchaser, among other things, furnished an abstract showing title in him; the purchaser accepted the offer, but failed to furnish an abstract. *Held*, that the acceptance was not such as to entitle the plaintiff to his commissions as having found a purchaser able and willing to buy on the terms proposed. *Marple v. Ives*, 111 Iowa 602, 82 N. W. 1017. See also Sec. 556.

Sec. 180. Purchaser able to give title to property offered in exchange, broker entitled to commissions.

A broker procuring a purchaser able to give title to the property agreed on to be conveyed by him as part of the trade, on the day fixed to carry out the trade, is entitled to his commissions, though, at the time the trade was arranged, the purchaser did not have title thereto. *Ravenscroft v. Chesmore* (Iowa Sup. '06), 108 N. W. 465. See also Sec. 87.

Sec. 181. Mistake in description defeated broker's right to commissions for effecting an exchange.

Defendant agreed to pay plaintiff a commission for finding a purchaser with whom he could exchange his stock of goods for land, and the plaintiff secured a contract with P. to exchange a certain tract of land for defendant's stock of goods, but by a mistake of P., the land described in the contract was not owned by him; it did not appear that defendant was aware of the mistake. *Held*, that plaintiff was not entitled to a commission. *Snyder v. Fidler*, 135 Iowa 304, 112 N. W. 546; *Hensel v. Witt*, 134 Wis. 55, 113 N. W. 1093. See also Secs. 59, 476.

Sec. 182. Failure of conditional agreement in contract of exchange defeated broker's right to commissions.

Where a real estate agent and the parties to the proposed exchange of properties understood that the agreement for ex-

change, and any right to commissions, was dependent on defendants acquiring outstanding interests in the property they proposed to exchange, and that their acceptance of the terms of the exchange offered by the other parties was, in fact, conditional on their acquiring such interests, commissions can not be recovered of defendants, their failure to acquire such interests not having been by their procurement or connivance. *Rieger v. Merrill*, 125 Mo. App. 541, 102 S. W. 1072. See also Sec. 45.

Sec. 183. Misrepresentation by agent to effect exchange defeated right to commissions.

Where a real estate agent, acting for both parties with their knowledge and consent in an exchange of lands, misrepresented to one of the parties that the other was the owner of a certain farm and rated it at a certain value, when he knew that the real owner was offering to sell for much less, such party was entitled to discharge him as agent, and he was not entitled to any commissions for an exchange of properties thereafter made between the parties. *Featherston v. Trone*, 82 Ark. 381, 102 S. W. 196. See also Secs. 313, 435, 451. Compare Sec. 165.

Sec. 184. In action for commissions for an exchange, receipt in another transaction inadmissible.

In an action by real estate brokers for a commission for negotiating an exchange of defendant's property, which defendant refused to carry out, a receipt given by one of the plaintiffs to defendant for a commission paid him by defendant for effecting a subsequent exchange of the same property with another purchaser is inadmissible, because foreign to the issues. *Goodman v. Linetzky*, 107 N. Y. S. 50.

Sec. 185. Exchange for certain amount to boot, broker entitled to commissions upon whole value of property.

Where a broker is entitled to commissions on a sale of real estate, and the land is disposed of by an exchange for a certain amount to boot, his commission is to be estimated upon the whole value of the property. *Carle v. Parent, Montreal* (Can.) L. Rep., 5 Q. B. 451. See also Sec. 149.

Sec. 186. Broker entitled to commissions on effecting binding contract for an exchange.

Where defendant, through an offer by plaintiff, after examination of a parcel of land, executed a contract with its owner to exchange his realty for such parcel, but afterwards refused to execute a deed, plaintiff is entitled to his agreed commissions, in the absence of evidence that it was dependent upon the execution of the executory contract. *Brown v. Grossman*, 65 N. Y. S. 1126, 53 App. Div. 640. See Secs. 150, 188.

Sec. 187. Broker barred commissions on failure of exchange on account of encroachments.

Where defendant entered into a contract for the exchange of real estate, provided that if the other party to the agreement rejected the title on the ground of bay-window and stoop-ledge encroachments, the deposit paid by each party should be returned in full of all claims, of which provision plaintiff, a broker employed by defendant, knew, plaintiff was not entitled to the commission on the rejection of defendant's title because of such encroachments. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546.

Sec. 188. Broker entitled to commissions on producing one willing to exchange.

Where a broker was employed to procure a purchaser or one willing to exchange property, his contract was performed when he procured a purchaser able and willing to purchase or exchange, and the fact that he made any material misrepresentations as to the property exchanged for his clients, was no bar to his recovery of his commissions. *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594. See also Secs. 150, 186. *Shepherd-Teague Co. v. Herman* (Cal. App. '10), 107 P. 622.

Sec. 189. Proof necessary for broker to recover commissions on failure to consummate exchange.

An owner employed a broker to procure a purchaser for his land on specified terms; the broker produced a third person who offered to buy and to convey certain lands in exchange therefor, and to pay a specified sum in addition. *Held*, that

the broker, in order to recover his commissions, may prove that the owner and the third person reached an agreement, and that the third person had title to, or was authorized to convey the land offered in exchange, and that he was financially able to respond in damages on the failure of title. *Blackledge v. Davis*, 129 Iowa 591, 105 N. W. 1000. Compare *Herscher v. Wills*, 103 Ill. App. 418.

Sec. 190. Execution of contract to convey prima facie evidence of title thereto.

Proof that a party has executed a formal contract to convey certain property in exchange for other property is sufficient *prima facie* evidence of his title thereto, in an action by a broker for commissions on effecting an exchange. *Muscowitz v. Hornberger*, 46 N. Y. S. 462, 20 Misc. 558. Compare *Herscher v. Wills*, 103 Ill. App. 418.

Sec. 191. Broker earns commissions when both parties agree on the terms of an exchange.

A broker employed to secure an exchange of land for a stock of merchandise earns his commissions, when the owner of the stock and the owner of the land procured by the broker agree on the terms of exchange, the owner of the stock having the right to reject the proposition for exchange, if acting in good faith. *Davidson v. Wills* (Tex. Civ. App. '06), 96 S. W. 634.

Sec. 192. Broker's right to commissions not affected by failure of one party to perform contract of exchange.

A broker's right to commissions for procuring the execution of a contract for an exchange of property being absolute, when the written contract of exchange was entered into, was not affected by the non-completion of the contract caused by the inability or unwillingness of one of the parties to perform. *Tieck v. McKenno*, 101 N. Y. S. 317, 115 App. Div. 701. See also Secs. 458, 460, 464.

Sec. 193. Failure to secure transfers by parties to exchange defeated broker's right to commissions.

An owner employed a broker to procure a purchaser for described real estate for a specified sum at a stated commis-

sion; the broker procured a third person to make an offer which the owner accepted, and the two entered into a contract for an exchange of property; the broker testified that the owner stated that if he could get a third person to agree to give a specified number of lots and a mortgage back of a specified sum the owner would pay a specified sum for commissions; the agreement for the exchange was not carried out because of a defect in the title of the third person, which the broker attempted to cure. *Held*, that the broker was not entitled to commissions, none being earned unless a transfer was made. *Keating v. Haley*, 147 Mich. 279, 110 N. W. 943; 13 D. L. N. 1035. See also Secs. 119, 224, 272, 449.

Sec. 194. Value of land exchanged shown to enable jury to determine whether commission earned and how much.

Where, in an action by a broker for commissions, the evidence showed that he was to receive \$2 per acre from the owner, if he received for his land \$16 per acre, or the amount per acre in excess of \$14, in case the owner did not receive \$16; that the owner exchanged his land for other land, and that the contract for the exchange fixed the price of the owner's land at \$16 per acre and the land received at \$45 per acre, the owner could show the value of the land received in exchange to enable the jury to determine whether or not he had received more than \$14 per acre for his land. *Steers v. Gingery* (S. D. '07), 110 N. W. 774. See also Sec. 1076.

Sec. 195. Broker not entitled to commissions for effecting an exchange where party does not show good faith.

A contract of exchange negotiated by a broker incompletely executed by the broker's principals, does not show willingness to perform by the alleged purchaser, where the form of the contract and the whole of the signatures thereto show that some of the conditions upon which the purchaser insisted could not be complied with. *Schulte v. Meehan*, 133 Ill. App. 491; *Mann v. Griswold*, 112 N. Y. S. 271, 59 Misc. 239.

CHAPTER IV.

LEASES.

Sec. 196. Value of services of broker in negotiating leases.

The value of the services of a real estate broker for negotiating a lease can not be measured by the value of the fee, regardless of the terms of the lease. *Daube v. Nessler*, 50 Ill. App. 166; *Grosscup v. Downey*, 105 Md. 273, 65 A. 930. He is entitled, in the absence of a special contract therefor, to a reasonable compensation, and this is usually based on the amount of rental. *Schultz v. Goldman*, 7 Ari. 279, 64 P. 425; *Hull v. Cardwell*, 2 N. Y. City Ct. 76.

Sec. 197. Lessor can not arbitrarily refuse to accept lease and defeat broker's right to commissions.

Under an agreement to pay commissions for negotiating a "satisfactory lease," the lessor can not arbitrarily refuse to accept a lease negotiated and thereby defeat a claim for commissions. *Mullaly v. Greenwood*, 127 Mo. 138, 29 S. W. 1001; See also Secs. 374, 454.

Sec. 198. Broker to sell, securing one willing to lease, not entitled to commissions.

An agreement to pay a commission to a real estate agent if he should find a purchaser for certain real estate does not entitle him to recover when he only finds a person who is willing to take a lease for ten years with the privilege of purchase, the vendors being executors and not authorized by the will to lease the property. *Wooley v. Schwall*, 5 Ohio Cir. Ct. 76, 3 Ohio Cir. Dec. 39.

Sec. 199. Option at specified rental not exercised by taking lease at a lower rental.

An option to take a lease at a specified rental is not exercised by securing a lease at a lower rental. *Curtis v. Nixon*, 24 L. T. R. (Eng.), N. S. 706. See also Sec. 101.

Sec. 200. Lease, with privilege of purchase, held equivalent to a sale.

A contract which ran for one year, provided that if plaintiff, a real estate broker, effected a sale of defendant's property, he was to receive a certain commission, and in case a sale was made without his aid, or the property was withdrawn from sale, one-half such commission. *Held*, that a lease by defendant for five years, with the exclusive privilege to the lessee of purchasing at a fixed price, at any time before the expiration of the lease, was a sale within the meaning of the contract entitling plaintiff to one-half the commissions. *Rucker v. Hall*, 105 Cal. 425, 38 P. 962.

Sec. 201. Charge properly refused which implied no leases were made without a broker.

In an action to recover brokerage for effecting a lease of real property, plaintiff did not allege that he had been employed by defendant, but alleged that defendant accepted plaintiff's services, with knowledge that they had been rendered. *Held*, that it was proper to refuse plaintiff's request to charge that, while the owner was entitled to know that the broker had been instrumental in sending the tenant, yet, when he knows that the tenant has received information of his intention to let, and his price, the owner is bound to inquire where the tenant got the information, as such instruction pre-supposes that leases are never made without the intervention of brokers, and that no information could be received as to what property was to be let except through brokers. *Tinkham v. Knox*, 21 N. Y. S. 954, 2 Misc. 579.

Sec. 202. Power to sell does not include power to lease.

A power to sell land does not include the power to lease or exchange it. *Trudo v. Anderson*, 10 Mich. 358; *Lampkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Reese v. Medlock*, 27 Texas 120.

Sec. 203. Agent of lessee secretly securing new term to himself holds as trustee.

A confidential agent of the lessee, before the lease expired, secretly procured a lease for a new term to himself, at a larger

rent, denying to the principal that he was competing for the lease. *Held*, that the agent must hold the lease as trustee for the principal. *Davis v. Hamlin*, 108 Ill. 39; *Gower v. Andrew*, 59 Cal. 119.

Sec. 204. Broker entitled to commissions for finding a responsible lessee on prescribed terms.

To entitle a broker to commissions for finding a lessee, he must procure a customer able, ready and willing to take the premises on the terms proposed by the principal. *Clark v. Dayton*, 87 Minn. 454, 92 N. W. 327.

Sec. 204a. To earn commissions for procuring tenant broker must negotiate a lease which the principal can perform.

To entitle a broker employed to procure a tenant for real estate to commissions, he must negotiate an agreement for a lease which his principal can perform. *Mann v. Griswold*, 112 N. Y. S. 271, 59 Misc. 239.

Sec. 205. Power to do all things concerning my real estate confers authority to lease.

A power authorizing an attorney "to superintend my real and personal estate, to make contracts, and in general to do all things that concern my interest in any way, real and personal, whatsoever," etc., empowers the attorney to convey real estate, and therefore to make a lease with the privilege of purchase. *De Rutte v. Muldrew*, 16 Cal. 505.

Sec. 206. Waiver of tenant's privilege of renewal of lease, secured by agent, binds principal.

Where a landlord accepted the waiver of the tenant's privilege of renewal procured by his agent from the tenant, and acted upon the same, he was estopped to deny the agent's authority in the premises. *Madison Ave. v. Osgood*, 18 N. Y. S. 126.

Sec. 207. Broker employed to collect rents not entitled to commissions for securing a lease.

A real estate agent employed to collect the rents on a lease taken in his name for the owners, but not negotiated by him,

is not entitled to a commission for the whole life of the lease, but only to commissions for collecting the rent while employed for that purpose by the owners. *Lucas v. Jackson*, 140 Pa. St. 122, 21 A. 310. See also Sec. 212. Compare Sec. 456.

Sec. 208. Broker for tenant has no claim on lessor for commissions.

A real estate broker who, at the inception of negotiations for a lease, and during their continuance, represented the tenant and not the lessor, has no claim on the latter for commissions. *Blake v. Stump*, 73 Md. 60, 20 A. 788, 10 L. R. A. 103; *Winter v. Cary*, 127 Mo. App. 601, 106 S. W. 539; *Callaway v. Equit. Trust Co.* 67 N. J. L. 44, 50 A. 900; *Carman v. Beach*, 63 N. Y. 97; *Haynes v. Fraser*, 78 N. Y. S. 794, 76 App. Div. 627; *Curry v. Terry*, 69 N. Y. S. 932, 34 Misc. 797; *Carroll v. O'Shea*, 18 N. Y. S. 146, 42 N. Y. St. R. 671; *Richtberg v. Carlton*, 108 N. Y. S. 1067, 58 Misc. 186; *Wireman's Est.*, 7 Pa. Dist. 759, 4 Weekly Notes Cas. 334. See also Sec. 25.

Sec. 209. Broker to procure a lessee not entitled to commission for procuring a mere option.

A real estate agent employed to lease property procured a proposed lessee to sign a paper reciting the payment of money on account of a deposit to be paid on the signing of a proposed lease, but such writing did not contain any promise to take a lease, nor were any terms specified. *Held*, that there was no lease, nor an agreement for a lease, and therefore the agent was not entitled to commissions. *Fusco v. Bullowa*, 40 N. Y. S. 676, 17 Misc. 573, 75 N. Y. St. 80; *Benedict v. Pincus*, 95 N. Y. S. 1042, 109 App. Div. 20; *Law & Bradford v. Schmidt*, 80 O. St. 108, 88 N. E. 319; *Rice v. Neuman*, 115 N. Y. S. 83.

Sec. 210. In action by a broker for commissions owner can show previous lease to another.

Where, in an action by a broker for commissions alleged to have been earned in procuring a tenant for defendant's property, there was no showing as to the character or business of the tenant claimed to have been procured, or any other fact tending to show that he was a satisfactory tenant, or that the

lease presented to defendant for signature was satisfactory to him; the evidence was insufficient to show performance of service by plaintiff for which defendant was liable, or to show that defendant had no right to lease the premises to another before the lease to the tenant procured by plaintiff was presented for signature. *Pescia v. Haims*, 99 N. Y. S. 421, 50 Misc. 550.

Sec. 211. Broker bound by first claim for commissions for lease and can not increase amount.

Where the plaintiff testified that he told defendant what the commission would be for a lease of his property, but was silent as to what the commission was, and the defendant said that the first claim plaintiff made was \$350, plaintiff can not recover a larger amount. *Duncan v. Borden*, 13 Colo. App. 481, 59 P. 60. See also Sec. 572.

Sec. 212. Broker securing lease for five years, and sale at second year, loses commissions for three years.

Where plaintiff procured a tenant for defendant for a term of five years, the lease providing that if the property was sold, it should be ended, and the property was sold, at the end of the second year, plaintiff was not entitled to commissions for the remaining three years of the lease as on an implied contract, although the sale was made to the tenant's wife, and the lease gave the tenant an option of purchase. *Mears v. Jones*, 102 Me. 485, 67 A. 555. See also Secs. 207, 456.

Sec. 213. Where lease forbade sub-letting, oral assent of agent therefor unavailing.

Where a written lease forbids sub-letting, the oral assent of the landlord's agent to such sub-letting, without any new consideration with the landlord is unavailing. *Spota v. Hayes*, 73 N. Y. S. 959, 36 Misc. 532. See Sec. 409.

Sec. 214. Lease by owner after broker's contract ended deprives him of commissions.

Defendant, the owner of a building, informed plaintiff, a real estate broker, that he desired a tenant, and stated that plaintiff should bring him an offer, if plaintiff could get one; plaintiff

then presented the question to a third person, who made two written offers to defendant, both of which were declined, after which the one making the offer told plaintiff that the matter was ended; but several weeks after such offers had been declined the one who had made them entered into negotiations with defendant, which resulted in the making of a lease. *Held*, that in the absence of any evidence of bad faith to defeat the rights of plaintiff to a commission, the facts did not show him entitled to the same. *Arnold v. Woollacott*, 4 Cal. App. 500, 88 P. 504. See also, Continuity Broken, Sec. 447.

Sec. 215. Broker bringing about the sale of a lease entitled to commissions.

One employed by the owner of a lease to negotiate a sale thereof, who begins negotiations which finally result in a sale as authorized, may recover compensation accordingly. *Northrup v. Diggs*, 128 Mo. App. 217, 106 S. W. 1123. See also Sec. 446.

Sec. 216. Broker not entitled to commissions where sale of lease frustrated by lessor's refusal to assign.

Where plaintiffs were employed to sell a dairy on certain terms and obtained a purchaser conditioned that the vendor's lessors would consent to assign their lease, and the landlords refused so to do, wherefore the sale was not made, they were not entitled to their commissions. *Ward v. Kennedy*, 101 N. Y. S. 524, 51 Misc. 422; *McCurry v. Hawkins*, 103 S. W. 600; 83 Ark. 242. See also Sec. 45.

Sec. 216a. Broker held not entitled to commissions where plaintiff refused to make lease.

A real estate broker said to one of defendant's officers that he could rent defendant's building for a theater, provided defendant would make certain changes. Several interviews followed, and plans of the desired changes were submitted by architects. The rent was practically agreed upon, and defendant also agreed to pay as commissions not more than \$3,000, nor less than \$2,500, "depending upon the terms and conditions

made with the proposed tenants." Defendant finally decided not to rent, whereupon the negotiations were terminated. *Held*, that defendant was not liable for the commissions. *Cohn v. James McCreary Realty Cor.*, 92 N. Y. S. 143, 102 App. Div. 611; *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269. See Sec. 33.

Sec. 217. Where lease was to highest bidder, broker preventing bidding not entitled to commissions.

A broker does not earn a commission for obtaining a lease of property from the city, where he was not the procuring cause thereof; it was required to be let to the highest bidder, whereas the only service he rendered was in preventing the attendance of other bidders. *Myers v. Dean*, 29 N. Y. S. 578, 9 Misc. 183. See also Sec. 559, 441.

Sec. 218. In action for commissions for securing a lease, defendant can show contract was merely tentative.

In an action for commissions for procuring a contract for a lease, defendant might show as against the plaintiff by parol, that the contract was merely provisional, did not express all the terms of the lease to be entered into between the parties, as was also understood by plaintiff, and that the lease was never consummated, because no final agreement was ever made between defendant and the lessee. *Burton v. Beal*, 49 Minn. 230, 51 N. W. 918; *Crombie v. Waldo*, 137 N. Y. 129, 32 N. E. 1042, 33 N. E. 744; *Laws v. Schmidt*, 80 Ohio St. 108, 88 N. E. 319.

Sec. 219. Finding for plaintiff as procuring cause of the lease excludes co-operation.

A finding for plaintiff, on the question whether he was the procuring cause in effecting a lease, excludes the idea that any other agency co-operated to bring about that result. *Bumfield v. Pottier, etc., Mfg. Co.*, 20 N. Y. S. 615, 1 Misc. 92.

Sec. 220. Broker to secure lease for eight years, to earn commissions must secure one for that time.

A broker was employed to obtain a lease for at least eight years of premises in which to conduct a certain business; he

obtained a lease on premises owned in part by infants, the youngest of whom would be of age in six years; the principal refused to accept the lease. *Held*, that the broker was not entitled to his commissions, since the guardian of the infants could make a lease good only during the infants' minority, and hence the broker has not found a person "able" to enter into the contract which he was authorized to negotiate. *Folsom v. Hesse*, 53 N. Y. S. 97, 24 Misc. 713.

Sec. 221. Lessor's rights under a receipt not affected by secret understanding of broker with tenant.

Where lessors were induced to execute a lease to a tenant procured by the lessor's broker, on receiving the broker's receipt for his commissions from the tenant, any agreement between the broker and the tenant as to the use of the receipt, made without the knowledge or consent of the lessors, would not affect their rights under the receipt. *Davis v. True*, 85 N. Y. S. 843, 89 App. Div. 319.

CHAPTER V.

LOANS ON REAL ESTATE.

Sec. 222. One employing a broker to obtain a loan, without disclosing the owner of the land, liable for commissions.

One who procures a real estate broker to obtain a loan on land, without disclosing the name of the owner of the land for whom the loan is intended, makes himself liable for the value of the broker's services. *Bacon v. Rupert*, 39 Minn. 512, 40 N. W. 832. See also Sec. 398.

Sec. 223. Broker to be paid commissions from proceeds, not entitled thereto where loan is refused for bad title.

Under a complaint alleging that plaintiff was employed by defendant to procure a loan on real estate, for which defendant promised to pay a certain sum on performance, plaintiff was not entitled to recover on proof that he obtained a person willing to make the loan, but refused to do so, because of defects in the defendant's title to the property which was to be mortgaged to secure the loan. *Hess v. Eggers*, 78 N. Y. S. 1119, 38 Misc. 726; *Stone v. Goodstein*, 97 N. Y. S. 1035, 49 Misc. 482. *Contra, Putzel v. Wilson*, 2 N. Y. S. 47, 49 Hun, 220. See also Sec. 570.

Sec. 224. Broker does not earn commissions where lender refuses to consummate loan.

A broker employed to procure a loan does not earn his commission by merely securing a lender who offers to make the loan, but who, after acceptance by the borrower, refuses to consummate the transaction. *Ashfield v. Case*, 87 N. Y. S. 649, 93 App. Div. 452; *Hanesley v. Bagley*, 109 Ga. 346, 34 S. E. 584; *Murry v. East End Imp. Co.*, 22 Ky. L. R. 147, 60 S. W. 648; *Marmaduke v. Martin*, 90 Mo. App. 629;

Crasto v. White, 5 N. Y. S. 718, 52 Hun, 473; *Finck v. Menke*, 67 N. Y. S. 954, 33 Misc. 769; *Duckworth v. Rogers*, 95 N. Y. S. 1089, 109 App. Div. 168. See Secs. 119, 193, 212, 449, 556.

Sec. 225. Broker not entitled to compensation for securing conditional loan defeated by defect in title.

A broker employed to procure a loan on real estate is not entitled to compensation merely because a lender was found who agreed to make the loan, "subject to conditions, title, etc., being found ultimately satisfactory," but who declined to make the loan after an examination of defendant's title to the real estate. *Chambers v. Ackley*, 91 N. Y. S. 78; *Gatling v. Central Spar Verein*, 73 N. Y. S. 496, 67 App. D. 50. See also Sec. 534.

Sec. 225a. Procuring agreement to make loan insufficient.

Procuring an agreement to make a loan is not the same as procuring a loan. *Rosenthal v. Gunn*, 119 N. Y. S. 165.

Sec. 226. Broker to recover compensation for loan must show on same terms as to payment, interest, etc.

In an action to recover upon an agreement by defendant to pay a specified compensation, when notified of the acceptance of an application for a loan addressed to the plaintiff, who was to undertake to procure the loan, it was held that although the evidence showed the acceptance by a corporation of an application made to it by the plaintiff for a loan, it was insufficient to sustain a recovery, because it did not show that the application made to the corporation and accepted by it embraced the same terms, as to rate of interest and time, as had been specified in the application of the defendant. *Peet v. Sherwood*, 47 Minn. 347, 50 N. W. 929; *Illingsworth v. Slosson*, 19 Ill. App. 612; *Kronenberger v. Teshemacher*, 101 N. Y. S. 764, 52 Misc. 130.

Sec. 226a. Defendant held liable to broker for commissions for procuring loan.

Defendant's real property was heavily incumbered with back taxes. Under an act of the Legislature she could by paying them off by a given date, gain a rebate of interest.

To accomplish this end, and after estimating the amount required, she employed plaintiff to procure a loan on bond and mortgage "for \$70,000 or \$80,000," his commission to be five per cent., and later the amount was raised to \$85,000. Plaintiff agreed to procure it in time for a compliance with the act. Defendant assumed the expense of "procuring tax bills." Plaintiff in due time found a lender ready, able and willing to furnish \$85,000. *Held*, that the agreement imposed no obligation upon either plaintiff or the proposed lender to obtain searches and estimates showing the exact amount of the taxes, and that the failure to do so did not relieve defendant from her liability for plaintiff's commissions. *Scott v. Woolsey*, 47 N. Y. S. 320, 20 App. Div. 541.

Sec. 227. On question of compensation for loan, former agreement as to value of services ignored.

The fact that at one time there had been an agreement between certain persons as to the compensation to be paid for services in procuring a loan is not, where the agreement has been abandoned, entitled to any consideration in an action to determine the reasonable value of such services. *Carruthers v. Towne*, 86 Iowa 318, 53 N. W. 240.

Sec. 228. Reasonable value of broker's services in procuring loan may be shown by testimony of experts.

Where loan brokers are employed to secure a loan, and different propositions as to compensation are made, and no proposal as to compensation applies perfectly, and the parties separate expressing themselves merely as willing to do what is right in the matter, evidence as to the reasonable value of the services rendered is, in view of the uncertainty of any agreement for specific compensation, properly admitted; the reasonable value of the services required to procure a certain loan may be shown by the testimony of persons experienced in making loans. *Id.*

Sec. 229. Broker liable for loss when loan made upon insufficient security.

A loan broker is liable to the lender on real estate for the loss of a loan negotiated by the broker upon a mortgage which

proved insufficient security in consequence of prior incumbrances, where the broker agreed to loan the money only on first mortgage security on real estate worth double the sum loaned, notwithstanding the property may have been, in fact, of double the value of all the incumbrances thereon. *Shipherd v. Field*, 70 Ill. 438; *Nicolai v. Lyon*, 8 Ore. 56; *Turnbull v. Gadsden*, 2 Strob. (Eq.) (S. C.) 14; *Rubens v. Merd*, 121 Cal. 17, 53 P. 432. See Secs. 346, 350, 403.

Sec. 230. A loan broker is bound to make good money lost through his negligence.

A money lender to whom a sum of money is given to invest is bound to exercise reasonable skill and prudence; by his business he holds himself out as possessing competent skill to determine what reasonable care and prudence requires; if he fails to exercise these, and through his negligence loss occurs, he is liable to make it good. *McFarland v. McClure* (Pa. Sup. Ct: 1886), 5 A. 50. See also Secs. 350, 403.

Sec. 231. Bill for extra compensation for procuring loan should be separated to see whether it is reasonable.

While it may be allowable to pay a broker for extra services, not usually necessary in procuring loans, in addition to the prescribed brokerage, the items composing his bill should be separated so that it may be seen whether the compensation is reasonable, or only a cover for demanding a larger commission. *Cook v. Phillips*, 56 N. Y. 310. See also Sec. 241.

Sec. 232. Broker for seller obtaining loan for buyer from seller can not recover commissions therefor from buyer.

A broker employed by the owner of lands to procure a sale thereof to one who shall agree to take from the owner a loan and improve the property can not, after recovering compensation from the owner of the property for effecting the sale, recover compensation from the purchaser for procuring the loan to him. *Vanderpool v. Kearne*, 2 E. D. Smith (N. Y.), 170. See Sec. 25. Compare Sec. 254.

Sec. 233. Broker procuring loan for less than asked, which is accepted, earns commissions.

In an action upon an agreement to pay a broker a commission for obtaining a loan, it appeared that a loan for a less amount was obtained, and at first accepted, but subsequently declined by the principal as being insufficient for his purposes. *Held*, that the services had been rendered and the commission was due, in the absence of any usage among New York brokers to receive no compensation unless the matter was consummated. *Van Lieu v. Byrnes*, 1 Hilton (N. Y.), 133.

Sec. 234. Broker entitled to commissions on finding lender unless rights varied by special contract.

A broker employed to effect a loan is entitled to his commissions, when he has found a lender who has the money and who approves of the security, unless his rights are varied by special contract; there is always an implied condition that the borrower will show a good title. *Budd v. Zoller*, 52 Mo. 238; *Rundle v. Staats*, 19 Colo. App. 164, 73 P. 1091; *Silberberg v. Chipman*, 42 Colo. 20, 93 P. 1130; *Brillow v. Ozienkowski*, 112 Ill. App. 165; *Phister v. Gove*, 48 Mo. App. 455; *Demarest v. Spiral Riv. Tube Co.*, 71 N. J. L. 14, 58 A. 161; *Rockwell v. Hurst*, 13 N. Y. S. 290; *Van Orden v. Morris*, 42 N. Y. S. 473, 18 Misc. 579, 43 S. 1108, 19 M. 497; *Chambers v. Peters*, 63 N. Y. S. 151, 30 Misc. 756; *Finck v. Schmidt*, 96 N. Y. S. 197, 48 Misc. 503; *Nefletberger v. Garner*, 109 N. Y. S. 747, 125 App. Div. 420; *Steinmetz v. Pancoast*, 17 Phila. (Pa.) 185; *Dorlan v. Forrest*, 91 N. Y. S. 431, 101 App. Div. 32.

Sec. 235. Broker not reporting loan barred commissions on applicant himself procuring.

Where an application for a loan is made to a broker, who secures a party willing to make the loan, but does not so notify the applicant, and after the time within which the broker was to place the loan has expired, the applicant, without knowledge of the steps taken by the broker, secures a loan from the same person with whom the broker had arranged to place it, he is not entitled to a commission. *Biddison v. Johnson*, 50 Ill. App. 173. See also Secs. 431, 471.

Sec. 236. In action by broker for commissions for procuring loan, not necessary to prove tender.

In an action by brokers to recover commissions for negotiating a loan, which the proposed borrower failed to accept and give security for as agreed, they need not prove a tender of the money, as it is the client's duty on notice of the money being procured to give the proposed security and take the money. *Telford v. Brinkerhoff*, 45 Ill. App. 586.

Sec. 237. Admissibility of correspondence to establish broker's agency in making loan.

On an issue as to whether a loan broker was the agent of defendant in negotiating a loan for him, or the agent of plaintiff company which made the loan, correspondence between the broker and the plaintiff's manager relative to defendant's loan and a requested extension thereof, and concerning other loans made by plaintiff through the broker, is admissible in evidence, and the question is one for the jury. *Jesson v. Texas Land & Loan Co.*, 3 Tex. Civ. App. 25, 21 S. W. 624.

Sec. 238. Improper to submit to jury whether loan broker improperly entered release of judgment.

A loan broker was the agent for both parties in the negotiation of a loan, which was to be secured by a trust deed of land incumbered by a judgment; the amount of the loan was sent to him by the lender, with instructions to see that the amount required by the terms of the deed be applied to secure a release of this judgment by the original judgment creditor, or a transfer of it to him by the present holder was so applied; the agent, at first being unable to obtain a release, took a transfer of the judgment, and afterwards obtained a release, which he forwarded to the lender; the transaction was completed, and subsequently, at the request of the borrower, and without any further instructions from the lender, the agent entered on the margin of the judgment record a receipt in full of the judgment. *Held*, that an instruction, in an action to obtain execution under the judgment, submitting the question whether the agent was authorized to execute a sat-

isfaction of the judgment, was improper. *Brown v. Dennis* (Tex. Civ. App. '95), 30 S. W. 272.

Sec. 239. Authority to broker to provide mortgage for loan confined to land designated.

A written contract by which defendant agrees to pay plaintiff for securing a loan for him, to mortgage certain property therefor, and to "authorize, ratify and confirm every act and thing the said M. may do in negotiating said loan," covers only every act and thing touching the land to be mortgaged, and does not bind defendant to sign a mortgage containing a covenant waiving the benefit of homestead and exemption laws as to all his property. *Roberts v. Matthews*, 77 Ga. 458.

Sec. 240. Where principal six months after cured defect in title, lender then refusing to loan, broker earned commissions.

The fact that the principal cures the defect in his title, does not deprive the broker of his right to commissions, where the principal gave no notice that the defect was cured until six months after the customer was procured, at which time the customer refused to make the loan because of changed financial conditions. *Clark v. Henry G. Thompson, etc., Co.*, 75 Conn. 161, 52 A. 720.

Sec. 240a. When loan not made broker must prove title not good.

If the title to property on which a loan was to be made was not good, it should be proved in a suit for procuring a loan thereon which was not made. *Rosenthal v. Gunn*, 119 N. Y. S. 165.

Sec. 241. Broker charging more, nevertheless entitled to statutory commissions for procuring loan.

Where a broker charges greater commissions for his services than the statute allows, in the absence of an agreement, this does not deprive him of the legal compensation. *Vanderpool v. Kearns*, 2 E. D. Smith (N. Y.), 170; *Buchanan v. Tilden*, 45 N. Y. S. 417, 18 App. Div. 123.

Sec. 242. Broker entitled to commissions for procuring loan though principal refuses to take.

A broker is entitled to a commission for procuring a loan at the request of his principal, though the latter refuses to take it when procured. *Squires v. King*, 15 Colo. 416, 417; *Collier v. Wayman*, 114 Ga. 944, 41 S. E. 50; *Vinton v. Baldwin*, 88 Ind. 104; *Hackman v. Gutweiler*; 66 Mo. App. 244; *Lord v. Moran*, 64 N. Y. S. 37, 31 Misc. 750; *Perry v. Bates*, 100 N. Y. S. 881, 115 App. Div. 337. Compare Sec. 242a.

Sec. 242a. Broker to procure loan not entitled to commissions unless loan made.

As a general rule, brokers employed to procure a loan are not entitled to the commission therefor until the loan is made. *Holliday v. Roxbury Distilling Co.*, 115 N. Y. S. 383.

Where one employing a broker to procure a loan on certain securities may be liable for breach of the contract, if the securities are not as valuable as he supposed and represented, so as to prevent him from obtaining the loan, the broker would not be entitled to recover commissions as for the full performance of the contract. *Holliday v. Roxbury Distilling Co.*, 115 N. Y. S. 383. Compare Sec. 242.

Sec. 243. Loan broker to whom borrower paid commissions his agent, though lender took payments from him.

Complainant requested a broker to find some one to whom complainant could loan a sum of money; the broker made a loan of such an amount to defendant, advancing his own money and taking a note and mortgage, which he turned over to complainant; complainant paid over the amount to the broker; defendant paid the broker for obtaining the loan; subsequently defendant made payments of interest to the broker, who remitted to the complainant; on such occasions complainant requested the broker to notify defendant when the interest was due. *Held*, that the evidence did not show that the broker was the agent of the complainant in receiving the payments. *Ortmeier v. Ivory*, 208 Ill. 577, 70 N. E. 665; *Ward v. Trustees*, 27 R. I. 262 61 A. 651. See also Sec. 254.

Sec. 244. Money put in bank, subject to check of broker for loans, did not make him agent of lender.

The mere fact that the lender of money deposited in bank a fund which should be subject to the check of the loan broker for the amount of the loan, if the lender, after an examination by himself of the application of the prospective borrower, should approve the same, did not constitute the broker the agent of the lender for the purpose of making loans. *Barksdale v. Security Inv. Co.*, 120 Ga. 388, 47 S. E. 943.

Sec. 245. Owner reserving right and himself securing loan, not liable to broker for commissions.

Where a broker is authorized to secure a loan for the owner of real estate, as exclusive agent, for the purpose of taking up a mortgage, the owner impliedly reserves the right to obtain the loan himself, and if he closes his arrangements before a person ready, willing and able to take the loan is furnished, the broker is not entitled to commissions; whether the loan is secured by the owner from a third party or by a renewal through agreement with the person holding the note and mortgage is immaterial, so far as concerns the broker's right to commissions under the implied obligations of the latter's agency. *Mott v. Ferguson*, 92 Minn. 201, 99 N. W. 804; *Davison v. Herndin*, 125 Ga. 385, 54 S. E. 92; *Kimball v. Hayes*, 199 Mass. 516, 85 N. E. 875. See also Sec. 247.

Sec. 246. Owner refusing loan on one ground subsequently estopped to set up another.

Where defendant refused to accept a loan negotiated by a broker, on the ground that the broker's charge for his services was excessive, defendant could not resist payment for such services on the ground that the lender incorporated a new condition in the application requiring defendant to comply with its rules and accept the loan within ten days. *Hotchkiss v. Kuehler*, 83 N. Y. S. 710, 86 App. Div. 265. *Contra, The List & Son Co. v. Chase*, 80 O. St. 42. See also Sec. 840.

Sec. 247. Broker failing to secure loan, principal securing from same party, bars commissions.

Where an agent was negotiating to procure a loan of not less than \$220,000; but failed to secure anything better than an offer of \$210,000; this not being accepted he abandoned the matter; he was not entitled to commissions when his principal subsequently took a loan of \$220,000 from the same party. *Stone v. Plant*, 96 N. Y. S. 1030. See also Sec. 245.

Sec. 248. Broker to examine title and secure loan, barred commissions on failure by defect in title.

A person wishing to borrow money on property applied to another who agreed to find a lender and to have the title examined, and to charge a certain sum, which would include the expense of examining the title and his commission, such person to give the agent his title deeds at the time; a defect being found in the title the lender refused to loan the money, and the agent sued for the amount of the stipulated compensation. *Held*, that such agent should have first examined the title before applying for a loan; he was the agent for that purpose as well as for procuring a loan, and was not entitled to commissions. *Budd v. Zoller*, 52 Mo. 238.

Sec. 249. Loan defeated through wrong dimensions known to broker bars commissions.

In an action by a broker to recover a commission for procuring a loan, it appeared that the written portion of the application for the loan was filled in by the broker, and he was aware when defendant signed the application that defendant was uncertain as to the exact dimensions of the lot on which security was to be given, though the dimensions were stated in the application, and the loan was rejected because the dimensions were not correctly given. *Held*, that, inasmuch as the broker was equally responsible with the defendant for not disclosing the situation to the lenders, and for their refusal to make the loan, he could not recover. *Shropshire v. Frankel*, 91 N. Y. S. 79, 45 Misc. 616. See also Sec. 435.

Sec. 250. Where loan prevented by defective title, error to grant broker judgment for full compensation.

Where an agreement was made to pay plaintiff \$800, if he secured a certain loan for defendant on its property, which sum was to cover all fees, lawyers' charges, disbursements, etc., it was error to grant a judgment for the full amount, where performance was prevented by reason of defendant's defective title. *Gatling v. Central Spar Verein*, 73 N. Y. S. 496, 67 App. D. 50; *Finck v. Pierce*, 103 N. Y. S. 765, 53 Misc. 554. See also Sec. 572.

Sec. 251. Attorney given interest in land, instead of cash, as fee for procuring loan.

The client having conveyed to the attorney an interest in the estate as compensation for his services, instead of a cash fee, he acquired an equitable lien thereon for his compensation in procuring the loan. *Goad v. Hart*, 128 Cal. 197, 60 P. 761, 964.

Sec. 252. Verdict for broker for procuring loan set aside as against the weight of the evidence.

A verdict for plaintiff will be set aside as against the weight of the evidence, where, on the issue, whether defendant agreed to pay six per cent. interest for the loan, so as to render him liable to plaintiff for procuring a person ready to make a loan at that rate, defendant testified that he did not agree to pay six per cent., and his testimony was contradicted only by the agent through whom the loan was to be made, who testified to a conversation with defendant about the loan, and stated that the rate of interest was to be six per cent., but stated no conversation to that effect, and testified that he wrote defendant the next day that he would make the loan at six per cent.; that defendant at once refused, because the interest was too high, and that he told plaintiff so when the question of interest was broached; since it is apparent that the statement that six per cent. was to be paid was merely an inference by the plaintiff. *Crandall v. Phillips*, 43 N. Y. S. 299, 13 App. Div. 118.

Sec. 253. Agreement as to commissions to broker for procuring loan a question for the jury.

In an action for commissions for securing a loan, where the evidence for plaintiff, though contradicted by defendant, tends to show an agreement to pay one per cent. on the amount loaned by parties secured by plaintiff, the question as to such agreement is for the jury. *Carter v. Moss*, 210 Pa. St. 612, 80 A. 310.

Sec. 254. Loan to purchaser on other property, procured by seller's broker, makes him agent of purchaser therefor.

A corporation appointed a real estate broker as its agent to secure a purchaser for land which the company owned in a city other than that in which it had its principal office; the person thus employed put up a "for sale" sign with his name on it as agent, but this was not known to the corporation; a purchaser was procured by the agent and offered a certain sum for the property; the secretary of the corporation waited upon the purchaser and endeavored to secure a better offer; not succeeding in this, he said that the purchaser might further "arrange with" the agent, naming him, or "finish it out with" the agent; the corporation subsequently accepted the offer of the purchaser; the latter then employed the agent to raise money on a mortgage on other real estate owned by him, and such a mortgage was arranged with a trust company; the money was paid to the agent who, in his books, credited it to the account of the purchaser, and made certain payments out of it at the request of the purchaser; and added certain payments to it received from the purchaser, so that the amount of the loan, which was the amount of the purchase money, was kept about the same; delay occurred in delivering the deed, and meantime the agent died, and his estate was found insolvent. *Held*, that the agent had no authority to receive the money on behalf of the corporation, and that in placing the loan and receiving the proceeds thereof he acted as the agent of the purchaser. *Louis Bergdott Brewing Co. v. Bobe*, 33 Pa. Super. Ct. 490. See also Sec. 243. Compare Sec. 232.

Sec. 255. Broker to procure loan, not thereby authorized to collect principal or interest.

The fact that a loan broker negotiates a loan does not authorize him to collect either principal or interest, though the security be payable at his office; nor does the fact that he has authority to collect interest authorize him to collect the principal. *Hefferman v. Botteler*, 87 Mo. App. 316; *Ortmeier v. Ivory*, 208 Ill. 577, 70 N. E. 665. See also Secs. 257, 352, 356, 566.

Sec. 256. Circumstances held to show broker the agent of lender, and not of borrower.

Where a principal loans money to a large number of borrowers, through an agent, and the latter by agreement takes all loans payable to himself and indorses the notes to the lender, and draws sight drafts for the amounts needed, and is intrusted with the care, renewal and collection of such loans, the lender is not a *bona fide* holder of negotiable paper, and payment to the agent is payment to the principal. *Cheshire Prov. Inst. v. Fuesner*, 63 Neb. 682, 88 N. W. 849; *Harrison Nat. Bk. v. Austin*, 65 Neb. 632, 89 N. W. 245; *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1086.

Sec. 257. Securities made payable at office of loan company do not make it agent to collect.

That a purchaser of negotiable mortgage securities, which are made payable at the office of the loan company negotiating them, knows that the loan company solicits payment of them regularly as they fall due, and that it interests itself in the payment of taxes and insurance to protect the security, does not make such loan company his agent to collect, nor charge him with the moneys so obtained, where he has no knowledge of any claim of authority from him or of ownership of the securities, and he retains possession of them, and places them in the hands of another agent with instructions to formally demand payment. *Bradbury v. Kinney*, 63 Neb. 754, 89 N. W. 257. See also Secs. 255, 352, 356, 566.

CHAPTER VI.

SECTION.

258-275. Mortgages.

276-281. Bonds.

SECTION.

282. Building materials, building contract—Builder's loan.

283-289a. Liens.

Sec. 258. Purchaser bound by agent's knowledge and can not dispute mortgagee's right to reform mortgage.

A broker who is employed by an owner of land to find a purchaser therefor and is paid a commission for his services may, after the conclusion of the contract of sale, lawfully become the agent of the purchaser, to pass on the title, pay the price, and receive the deed for the purchaser, if the purchaser has knowledge of his former relations to the vendor; hence, knowledge acquired by the broker before the contract of sale was closed that an outstanding mortgage executed by the vendor was intended by the parties thereto to cover the land embraced in the contract of sale, but through a mistake of the scrivener a different tract was described therein, was chargeable to the purchaser, and estopped him from disputing the mortgagee's right to have the mortgage reformed, and enforced against the land intended to be covered by it. *Vercruyse v. Williams*, 112 Fed. 206, 50 C. C. A. 486; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 P. 862. See also Sec. 844.

Sec. 259. Broker selling under power in a mortgage commits no breach in not notifying mortgagor of proposed sale.

A mortgage note was given by the mortgagee to a real estate broker for collection, and the mortgagor also placed the land in his hands for private sale; a private sale which the broker attempted to make having failed, on account of a defect in the title, and the mortgagor having ceased to trust or rely on the broker, the latter had the property sold under a power in the mortgage, without notifying the mortgagor, and it was

bought by a third person who had no privity with the broker. *Held*, that the broker was not guilty of a breach of trust. *Ritchie v. Judd*, 137 Ill. 453, 27 N. E. 682.

Sec. 260. Broker liable for loss through failing to record mortgage.

To an action against a broker employed to sell a dairy for damages sustained by the plaintiff through the broker's failure to record, in accordance with his undertaking, a mortgage taken by him from a purchaser of the dairy securing the latter's notes, which were assumed by a subsequent purchaser of the dairy from him, who afterwards conveyed it, and who, as well as the first purchaser, is insolvent, it is no defense that the dairy, when sold by the first to the second purchaser, was still unincumbered, and that plaintiff rejected an offer by the first purchaser to transfer the dairy to him in satisfaction of the amount due him. *Stewart v. Muse*, 62 Ind. 385. See also Sec. 349.

Sec. 261. Broker liable for loss from unpaid mortgage, where he undertook to examine the title.

In an action against a real estate agent for failure to examine the title of land purchased by him for plaintiff, a complaint alleging that the grantor had mortgaged the land conveyed and other land, and that the mortgages had been foreclosed and the land in question sold, without showing whether the grantor was not still the owner of the other land mortgaged and that it was not worth more than the mortgage debt, or that plaintiff applied for an order, in the decree for foreclosure, that such land be first sold, is demurrable. *Sears v. Forbes*, 122 Ind. 358, 23 N. E. 773.

An agent who had no knowledge of the mortgage, and had not agreed to examine the title is not liable to the purchaser for loss occasioned by the existence of the mortgage. *Id.* See also Sec. 349.

Sec. 262. Broker not entitled to charge expenses of foreclosing mortgage to principal.

A real estate broker made loans in his principal's name, and to secure his commissions took second mortgages in his own

name, and at sales thereunder bid in the property, and thereafter, without the knowledge of his principal, quit-claimed to her the lands so acquired, the deeds being placed among her papers in his possession. *Held*, that, in the absence of ratification and acceptance of the deeds, the broker was not entitled to credit for his expenses of foreclosures under the second mortgages and for taxes paid without the principal's knowledge, on the theory that such expenditures inured to her benefit. *Carpenter v. Monsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692.

Sec. 263. Power to sell does not include power to mortgage.

A power to sell land does not include power to mortgage. *Stronghill v. Anstey*, 1 De Gex, M. & G. (Eng.) 635; *Payn v. Cooper*, 16 Beavan (Eng.), 396; *Halderby v. Spofford*, 1 Beavan (Eng.), 390; *Jeffray v. Hurst*, 49 Mich. 31; *Contant v. Ser-voss*, 3 Barb. (N. Y.) 128; *Russell v. Russell*, 36 N. Y. 581; *Bloomer v. Waldron*, 3 Hill (N. Y.), 361; *Taylor v. Galloway*, 1 Ohio, 232.

A power to sell and convey does not, as a general rule, confer a power to mortgage, and a mortgage executed under a power of attorney authorizing the attorney to sell and convey is void. *Morris v. Watson*, 15 Minn. 212.

Sec. 264. Agent to invest money confined to first mortgages.

An agent employed to invest money on mortgage security, can not invest in a second mortgage, without the express consent of his principal, and if he does will be liable for negligence. *Whitney v. Martine*, 6 Abb. (N. Y.) N. Cases, 72.

Sec. 265. Broker making loan, knowing of prior mortgage, principal's subordinated thereto.

Where an agent makes a loan on mortgage, with knowledge of the fact that a prior unrecorded mortgage on the same property exists, taken by him as agent for another person, his principal in the second transaction takes charged with the knowledge of the agent, and can not enforce such second mortgage as against the prior unrecorded mortgage. *Constant v. Rochester Univ.*, 17 N. Y. S. 363. (In the States of Arkansas, North

Carolina and Ohio mortgages take precedence solely by priority of record, or notice in previous recorded conveyance of an unrecorded trust deed.) Jones on Mortgages Sec. 539.

Sec. 266. Power to purchase gives none to secure purchase money by mortgage.

An agent employed to purchase property with particular funds has no authority to mortgage the property to secure the purchase money, and such mortgage will not bind the property. *Fraser v. McPherson*, 3 Desau. (S. C.) 393.

Sec. 267. Whether agent taking mortgage with wrong description was guilty of negligence, a question for the jury.

In an action by a principal against an agent for negligence in procuring a mortgage to be executed in her favor, in which the land was wrongly described. *Held*, that it should be left to the jury to say whether the plaintiff was guilty of contributory negligence is not discovering the mistake, which was patent upon the face of the mortgage. *Munford v. Müller*, 7 Ill. App. 62.

Sec. 268. Mortgage taken by lender, bound by fraud of agent, and instrument set aside.

A guardian, by fraudulent proceedings in court, obtained an order and sold property inherited by his ward, and his vendee, who participated in the fraud, afterwards mortgaged the property to secure a large loan; the mortgage was made through a broker, and the mortgagee testified that the broker was defendant's agent for the service of process and for no other purpose, and that defendant dealt with him as with other brokers; the broker passed on the value of the securities, fixed the terms of the loans, subject to the mortgagee's approval, looked after the titles, employed attorneys to examine the same, received the money and paid it to the mortgagors, and in letters to the mortgagee spoke of the loans as made "by us;" in negotiating the loan in question he was associated with a third person, and attorneys were employed by them who knew of such fraudulent probate proceedings, and that the proceedings were made for the purpose of showing a clear title to the mort-

gaged property. *Held*, sufficient to show that the broker was the agent of the mortgagee so as to make notice of the fraud to him sufficient notice to the mortgagee to prevent the defense of good faith by it to an action by the ward to set aside such sale and mortgage as fraudulent. *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 P. 862; *Vercruyse v. Williams*, 112 Fed. 206, 50 C. C. A. 486.

Sec. 269. Payment on mortgage by purchaser to seller's agent, did not bind mortgagee.

Complainant purchased through a real estate agent property subject to a mortgage; subsequently respondent took an assignment of the mortgage which he failed to record; thereafter complainant made payments on the mortgage to the agent, without asking to see the mortgage or mortgage note, he assuming that the agent was the agent of the holder of the mortgage; the agent was not, in fact, employed by respondent, and did not account to him for the payments made by complainant on the mortgage, except by paying interest, in doing which he represented that he was acting for complainant. *Held*, that there was no evidence of the real estate agent's capacity as agent for respondent, so as to charge respondent with the receipt of the unaccounted for payments made by complainant. *Ward v. Trustees*, 27 R. I. 262, 61 A. 651; *Ortmeier v. Ivory*, 208 Ill. 577, 70 N. E. 665; *Henken v. Schwicker*, 73 N. Y. S. 656, 67 App. Div. 196, 174 N. Y. 298.

Sec. 270. Broker liable for negligence in failing to learn liability under a mortgage.

A real estate broker contracted for his principal to purchase land for a certain amount and assume the incumbrance as part of the consideration; the record of the mortgage on the land, while showing the rate of interest ordinarily borne by the notes secured by the mortgage, did not show that past due notes and installments of interest bore an increased rate of interest; the broker did not ascertain this fact and overpaid the vendor in consequence. *Held*, that the broker was guilty of negligence rendering him liable for the overpayment. *Hindricks v. Brady* (S. D. Sup. '06), 108 N. W. 332; reversed and modified Sec. 270a.

Sec. 270a. Broker held liable only for failure to collect for purchaser interest due as shown by the record.

A broker contracted for his principal to purchase land for a certain amount. There was a mortgage upon the land to secure several notes. The record definitely stated the rate of interest borne by the notes to be six per cent. per annum; but did not show that past due notes and installments of interest bore an increased rate of interest. The broker did not ascertain this fact, and failed to investigate, as requested by the principal, to see that one of the notes had been paid. The principal, going on the assumption that the one note had been paid, and that this bore only six per cent. interest, overpaid for the land, and sought to recover from the broker. *Held*, that the broker had a right to rely upon the recitals of the record, which definitely stated the rate of interest, as had the principal, who could not be held for the higher rate, and hence there could be no recovery from the broker for payments of interest in excess of that rate. Judgment, 20 S. D. 509, 108 N. W. 332, reversed on rehearing. *Hinrichs v. Brady* (S. D. Sup. '09), 121 N. W. 777.

Sec. 271. Broker liable for negligence for loss in taking mortgage on other and not on land sold.

A mortgage for \$1,200 taken by real estate brokers as security for the price of property sold by them, was on property valued at \$2,300, on which there was a first mortgage for \$1,800, no security was taken by the brokers on the property sold, and the purchaser became insolvent in about three months after the sale. *Held*, sufficient to sustain a finding that the broker was negligent in regard to the security. *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014. See also Sec. 349.

Sec. 272. Broker securing conditional sale of mortgage, not consummated, did not earn commissions.

Where a broker employed to sell the note and mortgage given by a cemetery association for money used to purchase real estate described in the mortgage, obtained a purchaser on condition that the latter's conveyancer was satisfied with the

mortgage, and the sale was not consummated because said conveyancer refused to approve the same, defendants being at all times ready to assign the note and mortgage to the purchaser procured, plaintiff was not entitled to recover commissions. *Wiggen v. Holbrook*, 190 Mass. 157, 76 N. E. 463. See also Secs. 119, 193, 224, 449. *Shapiro v. Nadler*, 99 N. Y. S. 879, 51 Misc. 13.

Sec. 273. Fraud of agent in appropriating money received to pay off mortgages.

Defendant applied to a real estate agent for a mortgage loan; three unsatisfied mortgages were to be paid with the proceeds of the loan; plaintiff agreed with the agent to make the loan, and gave the agent a check for the amount, taking a mortgage on the property, the agent assuring him that he would search the title and see that plaintiff had a first mortgage, but not informing him of the outstanding incumbrances; on execution of the mortgage defendant instructed the agent to pay off the three outstanding mortgages with a part of the money in his possession; the agent paid off one of the three mortgages only and appropriated the rest of the money. *Held*, that the payment of the amount of the loan to the agent was a payment to him as agent of the defendant. *Henker v. Schwicker*, 73 N. Y. S. 656, 67 App. Div. 196, 174 N. Y. 298. See also Sec. 269.

Sec. 274. Failure of purchaser to execute mortgage defeated broker's right to commissions.

A contract for the purchase of real estate provided that the same should be void, at the will of the vendor, if default should be made by the vendee in completing the purchase by making the due cash payments and executing a mortgage for the balance of the purchase money, time being of the essence of the contract, \$500 cash paid upon its execution to be forfeited to the vendor; a commission contract, executed at the same time, provided that the vendor would pay the broker \$2,500 commissions if the contract of purchase should be performed by making the payments and executing the mortgage.

as provided. *Held*, that the vendee having failed to make the deferred cash payments and to execute the mortgage, the vendor having been ready, willing and able to perform the contract until such default, could take advantage thereof, cancel the contract, and remove the cloud from the record by appropriate legal proceedings; under such circumstances commissions are not earned. *Van Norman v. Fitchette*, 100 Minn. 145, 110 N. W. 851.

Sec. 275. In computing commissions mortgage treated as part of purchase price.

Defendant was the owner of certain land on which there was a mortgage, for the payment of which he was not personally bound, and he gave plaintiff the exclusive sale of the land for sixty days, and one-half of all moneys obtained on the sale thereof over \$20 per acre, less \$455; plaintiff procured a purchaser to whom the defendant conveyed the land subject to the mortgage which the purchaser did not assume. *Held*, that in determining plaintiff's compensation the amount of the mortgage must be taken as a part of the purchase price. *Hobart v. Stewart*, 99 Minn. 394, 109 N. W. 704. See also Secs. 376, 369.

Sec. 276. Declaring bonds illegal deprived brokers of commissions for negotiating sale.

Plaintiff entered into an agreement with defendant who had agreed to take certain county bonds at par in payment of any county work which he had contracted to do, to sell the bonds, his commissions to be deducted from the second payment of money realized from the sale; plaintiff obtained a purchaser who was willing, able and ready to purchase the bonds, but before the second block was delivered the issue was declared illegal, their delivery perpetually enjoined, and the purchaser secured by the plaintiff never paid for the block delivered. *Held*, that the plaintiff was not entitled to any commissions for securing a purchaser, as no second payment was ever made. *Owen v. Ramsey*, 23 Ind. App. 285, 55 N. E. 247.

Sec. 277. Broker selling bonds entitled to commissions on procuring party ready to buy on terms specified.

A broker employed to sell bonds is entitled to compensation upon producing a party ready, willing and able to buy on the terms specified by the vendor, although the sale is not consummated, where the broker is without fault. *Thompson v. City of Sea Isle*, 58 N. Y. S. 203, 27 Misc. 834.

Sec. 278. Broker not entitled to compensation for sale of bonds where purchaser withdrew conditional acceptance.

Above case afterwards reversed, on the ground that the broker who was promised a commission to be paid on completion of the sale, was not entitled thereto where the purchaser whom he furnished withdrew a conditional acceptance of the bonds offered. *Thompson v. City of Sea Isle*, 59 N. Y. S. 596, 28 Misc. 494. See also Sec. 556.

Sec. 279. Broker transferring bonds by delivery, without disclosing principal, liable in case they are null and void.

If a broker or other agent transfer bonds by delivery, without disclosing who is his principal, he is, himself, to be regarded as the principal, and is responsible to refund the money paid, if the bonds are declared null and void. *Herwig v. Richardson*, 44 La. Ann. 703, 11 So. 135. Compare *Cooper v. Illinois Central R. Co.*, 57 N. Y. S. 925, 38 App. Div. 22.

Sec. 280. Broker selling bonds in good faith not liable to trust estate because illegally sold.

Bonds belonging to a trust estate were presented to certain brokers at a time when they were registered in the name of S, executor; some days later, when left with them for sale, they had been discharged from registry and were payable to bearer; it did not appear that the brokers had any knowledge that the executor was dead, or of the condition of the estate of which he was executor. *Held*, that, on a sale by them of such bonds they were not liable to the estate, because the bonds were in fact a part of the trust fund and illegally sold. *Cooper v. Ill. Cen. R. Co.*, 57 N. Y. S. 925, 38 App. Div. 22. Compare *Herwig v. Richardson*, 44 La. Ann. 703, 11 So. 135.

Sec. 281. Authority to a village to issue bonds, includes authority to employ broker to dispose of them.

Express authority of a village to borrow money and issue bonds therefor, includes implied authority to employ a person to procure a purchaser for the bonds, whether he be a broker or not. *Armstrong v. Village of Ft. Edwards*, 159 N. Y. 315, 53 N. E. 1116.

Sec. 282. Building materials, building contract, builder's loan.

In an action against a real estate agent to compel him to convey property which it was alleged he had been employed to purchase for his principal, and the title to which was taken in the agent's name and for damages, the advance which, in the meantime, had taken place in the price of building material, was held too remote to constitute an element of damages. *Harrison v. Craven*, 188 Mo. 590, 87 S. W. 962.

A broker was held entitled to recover compensation for furnishing information in consequence of which a builder entered into a contract for the erection of a building. *Kaestner v. Oldham*, 102 Ill. App. 372.

Where there is a special agreement to that effect, a broker who secures a responsible purchaser, who buys subject to a builder's loan, is not entitled to his commissions till the purchaser has earned his first payment; i. e., when the second tier of beams is laid. *Leitner v. Boehm*, 56 N. Y. S. 227.

Sec. 283. Broker has a lien on securities in his hands for his commissions.

A broker is entitled to a lien for his commissions on a note and mortgage or on the proceeds thereof left in his possession to negotiate a sale thereof. *Peterson v. Hall*, 61 Minn. 268, 63 N. W. 733; *Carpenter v. Monsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692. *Contra, State Bank v. Cullen* (N. D. Sup. '09), 121 N. W. 85.

Sec. 284. A loan broker has a lien for his fees on funds coming into his hands.

A broker employed to obtain a loan of money upon a commission has a lien for his fees and may retain them. *Vinton v. Baldwin*, 95 Ind. 433. See also Secs. 285, 288.

Sec. 285. In the absence of a contract a broker has no lien on funds or securities of his principal.

A real estate broker has no lien for services on a certificate of deposit belonging to the principal. *Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853; *Arthur v. Sylvester*, 105 Pa. St. 233; *Jones' Appeal*, 80 Pa. St. 54; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418. See also Sec. 373.

However, there are cases upholding the broker's right to such special lien. *Richards v. Gaskell*, 39 Kan. 428, 18 P. 494; *Carpenter v. Monsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692; *Vinton v. Baldwin*, 95 Ind. 433; *Gerry v. Brumage*, 46 Ind. 59.

Sec. 286. Where broker has a lien it exists only so long as he holds the property.

The equitable lien of a broker exists only so long as he has possession of the land or title papers, and his debt remains unbarred by the statute of limitations. *Byers v. Danley*, 27 Ark. 77.

Sec. 287. The lien of a broker for commissions is confined to the specific securities affected.

A real estate broker, who is not an attorney-at-law, can not claim a general lien on all securities in his possession for expenses incurred in managing some of such securities, but the lien is confined to the specific securities for which the expenses were incurred. *Carpenter v. Monsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692.

Sec. 288. A broker procuring a loan for a trust estate has no lien thereon.

In the absence of a specific agreement a broker who procures a loan for the benefit of a trust estate has no lien on such estate for his commissions, his remedy being against the trustee personally. *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435. Compare Secs. 284, 285.

Sec. 288a. Instruction that if broker changed contract believing defendant would see before signing, not prejudicial to plaintiff.

In an action for a broker's commissions, an instruction that if the broker caused a change to be made in the contract, believing the defendant would see the change when the contract was delivered to him, then the defense of fraud on the part of the broker in so changing the contract was not sufficiently established to defeat plaintiff's claim for commissions, was not prejudicial to plaintiff. *Robertson v. Vasey*, 125 Iowa, 526, 101 N. W. 271.

Sec. 289. Where a broker took the excess for commissions the expenses of releasing a lien fell on the principal.

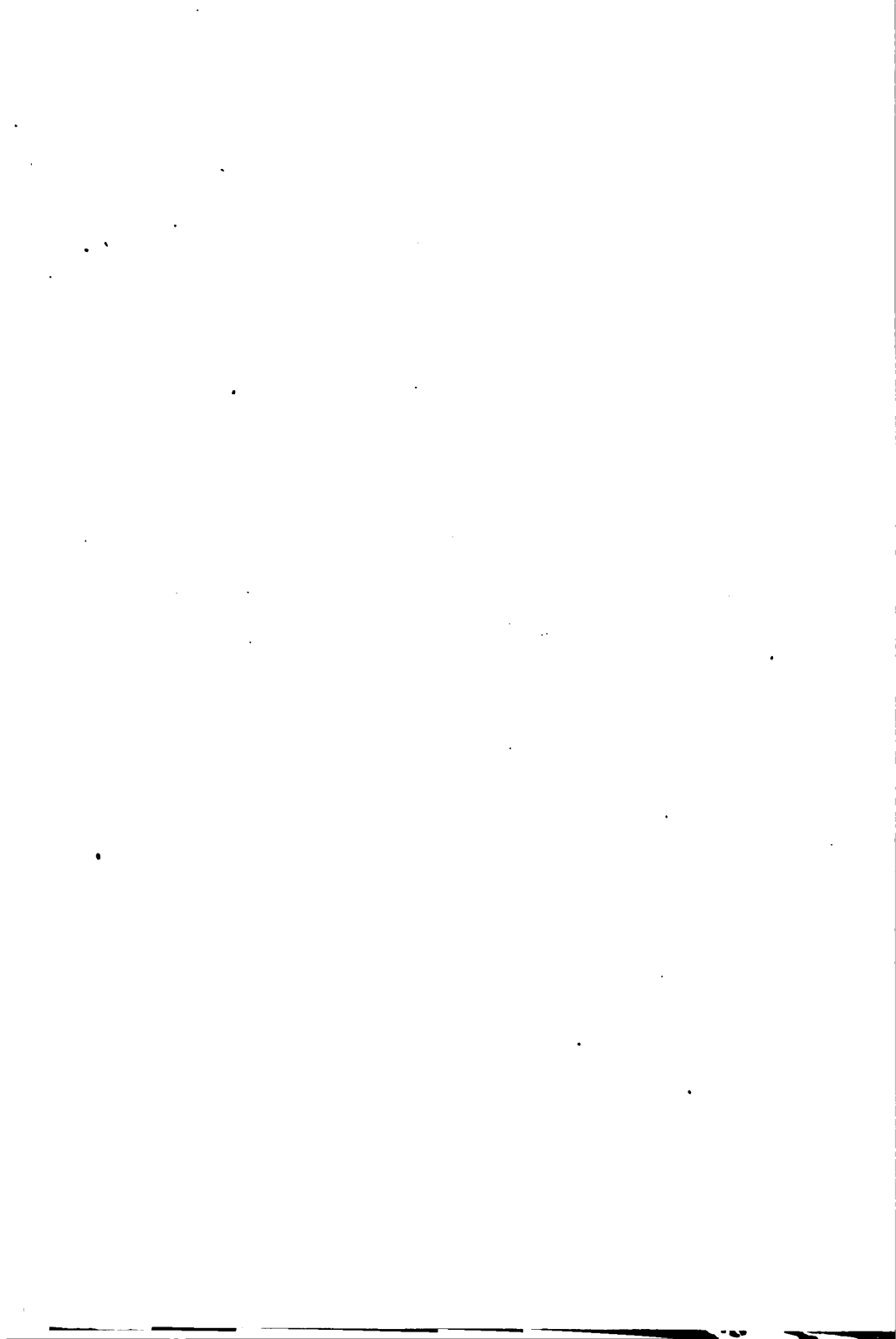
A real estate agent employed to sell land was to have all obtained over a certain price. *Held*, that the expense of getting rid of an existing lien on the lands must be borne by the principal, not by the agent. *Wisehart v. Deitz*, 67 Iowa, 121, 24 N. W. 752.

Sec. 289a. Commissions assumed by vendee not a lien on property.

Where a commission for the sale of real estate due from the vendor to the agent was assumed by the vendee at the time of purchase without an agreement to that effect, the debt does not become a lien on the land. *Mayfield v. Turner*, 130 Ill. 332, 54 N. E. 418.

PART III.
RIGHTS, DUTIES AND LIABILITIES
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as to net the principal a certain sum, and that he is selling for a greater sum and will retain the excess as commissions, and no contract is shown that he shall receive any specified amount for his services, the agent commits no fraud by failing to disclose such amount. *Deming Inv. Co. v. Meyer*. (Okla. Sup. '07), 91 P. 846; *Fulton v. Watters*, 216 Pa. 56, 64 A. 860. Compare Sec. 456. The employment of a sub-agent is not ordinarily a breach of duty to the principal. *Nodler v. Pozorski*, 124 Wis. 477, 102 N. W. 892. There is no duty devolving upon a broker to tell his principal of other lands he has listed with him for sale. *Gaty v. Sack*, 19 Mo. App. 470.

All agreements between a real estate agent or broker and a proposed purchaser touching the subject matter of his employment, which are not disclosed to his principal should be scrutinized closely and if not found compatible with entire integrity and good faith toward his principal, they will defeat the agent's claim for commission. *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841; *Skinner v. Danville* (Fla. Sup. '09), 49 S. 125. See also Secs. 291, 314, 320. Agency for both principals is forbidden, unless both, with full knowledge thereof, consent. *Bates v. Copeland*, McArthur & M. (D. C.) 50; *Alexander v. N. W. Chr. Uni.*, 57 Ind. 466; *Lloyd v. Colston*, 5 Bush (Ky.), 587; *Raisin v. Clark*, 41 Md. 158; *Follansbee v. O'Reilly*, 135 Mass. 80; *Horwitz v. Penner*, 128 Mich. 688, 87 N. W. 1034; *Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229; *Leathers v. Canfield*, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; *Scribner v. Collar*, 40 Mich. 375; *Dartt v. Somnesym*, 86 Minn. 55, 90 N. W. 115; *De Steiger v. Hollington*, 17 Mo. App. 382; *Pugsley v. Murrau*, 4 E. D. Smith (N. Y.), 245; *Dunlap v. Richards*, 2 E. D. Smith. 181; *Watkins v. Consell*, 1 E. D. Smith, 65; *Brierly v. Connolly*, 64 N. Y. S. 9, 31 Misc. 268; *Norman v. Reuther*, 54 N. Y. S. 152, 25 Misc. 161; *Rowe v. Stephens*, 53 N. Y. 621; *Geery v. Pollock*, 44 N. Y. S. 673, 16 App. Div. 321; *Abel v. Disbrow*, 44 N. Y. S. 573, 15 App. Div. 536; *Lansing v. Bliss*, 33 N. Y. S. 310, 86 Hun. 205; *Whitney v. Saunders*, 49 N. Y. S. 1016, 22 Misc. 539; *Tricks v. McKenna*, 101 N. Y. S. 317, 115 App. Div. 701; *Haviland v. Price*, 26 N. Y. S. 757, 6 Misc. 372; *Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850; *Maxwell v. West*,

ald v. Maltz, 94 Mich. 172, 53 N. W. 1058; *Wood v. Palmer*, 151 Mich. 30, 115 N. W. 242, 14 D. L. N. 963; *Low v. Woodbury*, 95 N. Y. S. 336, 107 App. Div. 298. Good faith is not shown by the broker clandestinely also representing the opposite party. *Perkins v. Underhill*, 103 N. Y. S. 25, 118 App. Div. 170.

The obligation is reciprocal, and the owner, in revoking a contract with his broker, must act in good faith. *Bailey v. Smith*, 103 Ala. 641, 15 So. 900; *Branch v. Moore*, 84 Ark. 462, 105 S. W. 178; *Uphof v. Ulrich*, 2 Ill. App. 399; *Bealer v. Creswell*, 3 Md. 196; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21; *Alden v. Earle*, 56 N. Y. Sup. Ct. 366, 4 N. Y. S. 548; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892.

The act of the vendor in secretly paying commissions to the purchaser's agent is contrary to good faith and the policy of the law. *Lightcap v. Nicolai*, 34 Pa. Super. Ct. 189. And in such case the purchaser has a right of action against the vendor to recover the amount thereof. *Grant v. Gold Ex., etc.*, Syn. (1900), 1 Q. B. (Eng.) 233, 69 L. J. Q. B. 150, 82 L. T. R. N. S. 5, 48 W. R. 280. Where an agent bought his principal's land by sheriff's deed good faith was violated, and the conveyance will be set aside. *Smeltzer v. Lombard*, 57 Iowa, 294.

A broker who, in association with others, purchases his principal's property, where all is open and he acts in good faith, is entitled to recover commissions on the sale. *Reed's Ex. v. Reed*, 82 Pa. St. 420; *Texas Brok. Co. v. John Bakly & Co.* (Tex. Civ. App. '08), 109 S. W. 1001; *Blount v. Robeson*, 3 Jones (N. C.), Eq. 73. Where an owner of real estate, which he has listed with an agent for sale for a definite price, sells the same unknowingly, through a go-between, to whom the deed is made, to one who was induced to purchase it by the efforts of the agent, but in good faith, and in ignorance of the real purchaser, and for a consideration less than that given the agent, is not, there being no exclusive agency, liable for the commission agreed to be paid for the production of a pur-

chaser ready, able and willing to pay the price fixed. *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65. Compare Sec. 444.

A real estate agent owes to his principal the duty of making a full, fair and prompt disclosure of all the circumstances affecting the principal's rights or interests; whatever advantages accrue to him by the violation of that duty, he must make good to his principal; if, after he has in fact contracted to sell the land to a third person at an advanced price, he purchases the land himself from his principal, without disclosing the contract, and if he thereafter completes the sale, he renders himself liable to his principal in damages. *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543. See also Sec. 389. A broker employed to purchase property should inform his principal of the lowest price at which it may be bought; a failure to do this is a breach of the duty he owes his principal. *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479.

A real estate broker had found a purchaser at the price stipulated for land purported to be owned by his principal, and was then referred by him to other tenants in common, with whom he subsequently made terms at a higher price, except two-eighths interest owned by them, but did not disclose this to his first principal. *Held*, there was no duty owing by the agent as to the outstanding two-eighths, and it was not incumbent upon him to inform his principal. *Black v. Barr*, 14 Pa. Super. Ct. 98, 651.

Where no other instruction defining a broker's duty is given, it is error to refuse an instruction that the duty of a broker is to bring the buyer and seller together and effect a purchase of the property according to the terms agreed on by the seller and the broker, and that the latter is not entitled to commission for an unsuccessful effort to effect a sale. *West v. Demme*, 128 Mich. 11, 87 N. W. 95. See also Sec. 543.

A complaint for a broker's commissions under a contract, whereby defendant agreed that, in consideration of plaintiff's procuring a contract to be made with E for the purchase of certain land of the defendant, plaintiff should receive a commission in the event of the closing of title, and only in the event that title should pass, except for default of defendant, is insufficient in alleging only that plaintiff procured a con-

tract for the purchase of the land to be executed by defendant and E, and that because of the default of defendant the premises were not conveyed; it should show that E was ready to take title under the terms and at the time provided in the contract, and the particular acts of omission of defendant which prevented the passing of the title. *Davis v. Silverman*, 90 N. Y. S. 589, 98 App. Div. 305.

In an action against their principal for damages for the loss of commissions caused by the refusal to accept the deed and carry out the contract where the defense is want of mental capacity to contract, evidence of the actual value of the property is competent only when offered to show that the price offered was so exorbitant as to be inconsistent with good faith on the part of the brokers in undertaking to contract for the purchase at the price authorized. *Cavender v. Waddingham*, 5 Mo. App. 457.

Unless the principal is fully advised of all the facts a broker employed to buy real estate can not sell to his principal property in which he has an individual interest. *England v. Burnett, R. E., etc., Co.*, 79 Mo. App. 294.

Nor may a broker employed to sell property become the buyer thereof. *Cornwall v. Foord*, 96 Ill. App. 366; *Smith v. Townsend*, 109 Mass. 500; *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116; *Gardner v. Ogden*, 22 N. Y. 327; *Harrison v. McHenry*, 9 Ga. 164; *Ames v. Pt. Huron Log, etc., Co.*, 11 Mich. 139; *Robertson v. Western M. & F. Ins. Co.*, 36 Am. Dec. 673; *Moseley v. Back*, 3 Munf. (Va.) 232; *Clark v. Bird*, 66 N. Y. App. Div. 284, 72 N. Y. S. 769.

If a real estate owner places property in the hands of a broker for sale at a fixed price, and the broker sells it for more to one for whom he is acting as agent for the investment of money, and secretly retains the excess he commits a fraud upon the seller and the purchaser for both of whom he acts as agent, and subjects himself to a double recovery of the excess. *Lewis v. Dennison*, 2 App. Cas. (D. C.) 387; *Hannon v. Prentiss*, 124 Mich. 417, 83 N. W. 102; *Marsh v. Buchan*, 46 N. J. Eq. 595, 22 A. 128. See also Sec. 964.

To entitle a broker to recover commissions for selling defendant's property, he must show an employment, the rendi-

tion of services at defendant's request, and that he acted in good faith for their best interests. *Roome v. Robinson*, 90 N. Y. S. 1055, 99 App. Div. 143.

A broker employed to sell real estate for \$105,000 or more is not entitled to recover commissions where he might have procured a purchaser at \$110,000 instead of \$105,000. *Lichtenstein v. Mott*, 91 N. Y. S. 57, 99 App. Div. 570; *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53. See also Sec. 412a.

A purchase by a real estate agent of the property in his hands for sale, without the knowledge of his principal, is sufficient to avoid the transaction, no matter if there was no actual fraud or no injury to the principal resulted. *Butler v. Agnew*, 9 Cal. App. 327, 99 P. 395.

A broker employed to procure a purchaser of real estate, is not liable to the principal for failing to exercise proper diligence to obtain a purchaser, nor for failing to communicate to the principal the fact that he has procured an intending purchaser; but he may terminate his efforts without notice to the principal. *Siegel v. Rosenzweig*, 114 N. Y. S. 179, 129 App. Div. 547.

A real estate broker can not be held liable for representing to an intending purchaser, that the owner would not accept less than the sum named by the broker for the premises, though the owner had, in fact, agreed with him to sell at a lower figure, in the absence of any confidential relations between the broker and the intending purchaser or fraud to prevent inquiry or investigation by such purchaser. *Ripy v. Cronan* (Ky. Ct. App. '09), 115 S. W. 791.

An agent to buy lands for his principal can not buy of himself; and an agent to sell lands for his principal can not sell to himself; nor can an agent to receive payments for his principal, bind the latter by the receipt of money due from himself. *Mechem on Agency*, Sec. 68.

Where a selling broker is aware that a customer is resolved and prepared to pay the price asked, he should not send the customer to his principal to negotiate directly, without communicating to the principal his knowledge of the customer's resolution; and, if he withholds such information from the principal, he forfeits any claim for commissions, even though

the principal obtained from the customer the full price originally asked. *Carter v. Owens* (Fla. Sup. '09), 50 S. 641.

Sec. 291. Concealment and its effect upon rights.

Where defendants, who were employed by plaintiff to find a purchaser for a lot, after finding a purchaser and receiving part of the price, knew before the deed was delivered that the purchaser had sold at an advance, but did not inform plaintiffs, his claim, if any, against them, is for damages, for which an action at law is the proper remedy. *Dickinson v. Updike* (N. J. Err. & App.), 49 A. 712. The rule that a fiduciary land agent is bound to make the fullest disclosure of all matters connected with property bought by himself from his principal extends to avoid a subsequent sale of the property by such agent to a party cognizant of the concealment. *Norris v. Taylor*, 49 Ill. 17. Compare, *Collins v. Case*, 23 Wis. 230. A real estate broker who conceals from his principal the name of the purchaser whom he procures, and the fact that such purchaser has bought an adjoining lot, and does this for the avowed purpose of preventing the principal from advancing the price, is not entitled to commissions. *Wilkinson v. McCullough*, 126 Pa. St. 205, 46 A. 357. See also Sec. 290..

Where the broker possesses an interest, in addition to his employment, in the transaction he has contracted to negotiate, and fails to disclose it to his principal, such omission of duty deprives him of the right to compensation for his services. *Collins v. McClurg*, 1 Colo. App. 348, 29 P. 299; *Jeffries v. Robbins* 66 Kan. 427, 71 P. 852; *De L'Archerie v. Rutherford* (Wash. Sup. '09), 102 P. 1033; *Buck v. Hozzeboom* (Neb. Sup. '02), 90 N. W. 635; *Ryan v. Kahler* (Tex. Civ. App. '98), 46 S. W. 71. All agreements between a real estate agent or broker and a proposed purchaser touching the subject matter of his employment, which are not disclosed to his principal should be scrutinized closely, and if not found compatible with entire integrity and good faith toward his principal, they will defeat the agent's claim for commissions from his principal. *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841. See also *supra* and Secs. 290, 314, 320. Where a sub-agent allows the owner to go on and deal with a prospective purchaser as though he was free from obli-

gations for commissions, and lowers his price to him in consequence, while concealing the fact that he, the said sub-agent, was acting for the agent, this conduct prevents the latter, on a sale being made, from recovering from the seller any compensation for his services. *Mullen v. Bowen*, 22 Ind. App. 294, 53 N. E. 790. Where the broker's name was signed to a paper containing an offer to purchase the property and his participation was not sought to be concealed, and he acted openly and fairly, his right to recover commissions was not affected by the fact that he was one of the intended purchasers. *Reed's Ex. v. Reed*, 82 Pa. St. 420. Where an agent purchases the property at a grossly inadequate price, by the concealment of facts and information relating thereto, which it was his duty to disclose, the sale will be set aside. *Norris v. Taylor*, 49 Ill. 17.

Where an agent employed to sell a ranch introduced to the owner a customer who, at the time, had not the money to buy, but was expecting to get money, and did afterwards get the money and completed the purchase from the owner on substantially the same terms as those furnished to the agent by the owner, the agent was entitled to his commissions; the fact that the connection of the agent with the transaction was, by agreement between the agent, the owner and a third party, through whom the purchaser was introduced to the owner, kept secret from the purchaser, did not taint the contract with dishonesty so as to defeat the agent from recovering his commissions. *McC Campbell v. Cavis*, 10 Cal. App. 242, 50 P. 728.

Where an agent for the sale of land is to receive as his compensation all above a minimum sum per acre and a fixed sum in addition, and the agent sells the land for an amount above the minimum, but conceals that fact and reports to the principal that he has sold it at the minimum, he will not be entitled to recover the additional fixed sum agreed upon. *Fulton v. Waters*, 28 Pa. Super. Ct. 269, Rev. 216 Pa. 56, 64 A. 860. (This ruling was reversed by the Supreme Court and the broker held entitled to the additional fixed sum, on the ground that there was no relation of trust and confidence that required from the broker a disclosure to the owner of the terms of the sale.)

Where the agents for the sale of land conceal from the purchaser the fact that they are part owners of the land, but

instead express an intention to purchase an interest themselves upon the same terms as they are selling to the purchasers, such representations would constitute such a fraud as would avoid the purchase. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

In an action by a real estate agent for commissions, the owner testified that when the agent's sub-agent introduced a purchaser, the latter stated he wished to deal directly with the owner, who then stated a less price than fixed in the contract of employment; the owner testified that the sub-agent and the purchaser stated that they made no arrangement with the agent, that the sub-agent said nothing about commissions, and that he (the owner) told the purchaser and sub-agent that if the agent had sold the land, he would have to let it go; the sub-agent testified that he asked the owner if the latter would not have trouble with the agent about the commissions; to which the owner replied that he would not, as he was selling the farm; the sub-agent testified that he told the owner he did not charge any commission, as he would get that from the agent; the purchaser substantiated the sub-agent's testimony; there was no evidence to show that the owner knew that the sub-agent was acting for the agent. *Held*, that the question whether the sub-agent concealed such fact from the owner should have been submitted to the jury. *Mullen v. Bowen*, 22 Ind. App. 294, 53 N. E. 790.

Where a broker reports an offer for property to his principal, without stating by whom the offer is made, and afterwards a sale of the same property is effected through another broker at the same price first reported and to the same purchaser and he receives a commission therefor, the first broker can not recover in an action against the vendor for the commissions, unless it appears that the latter at the time of the sale was aware of the facts above stated, or that notice of the same was given by the broker before the completion of the contract with and payment of commissions to the second broker. *Tinge v. Moale*, 25 Md. 480; *Jungblut v. Gindra*, 118 N. Y. S. 942; *Soule v. Dearing*, 87 Me. 365, 32 A. 998. Compare Sec. 581.

Securing a purchaser whose name is concealed from the owner of the property is insufficient to entitle the broker to commissions. *Hayden v. Grillo*, 35 Mo. App. 647; *Sharpley v. Moody*,

44 S. 650, 152 Ala. 549; *Nance v. Smythe*, 118 Tenn. 349, 99 S. W. 698; *Wiggins v. Wilson*, 55 Fla. 346, 45 S. 1011; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790. Compare *Butman v. Butman*, 213 Ill. 104, 72 N. E. 821; *Hovey v. Aaron*, 113 S. W. 718, 133 Mo. App. 573.

Where an agent does not disclose his agency and name his principal, he becomes himself principal, unless the fact of the agency is otherwise known to the other party. *Wheeler v. Reed*, 36 Ill. 81; *Milliken v. Jones*, 77 Ill. 372; *Warren v. Dickson*, 27 Ill. 115; *Merrill v. Wilson*, 6 Ind. 416; *Pierce v. Johnson*, 34 Conn. 264; *McClellan v. Parker*, 27 Mo. 162; *Royce v. Allen*, 28 Vt. 234.

A contract for the sale of real estate, made between the owner and a firm of real estate brokers with whom the owner has listed the property for sale is valid and enforceable, where there was no fraud or deception practiced, and the brokers fairly stated to the owner the fact that they did not purchase for themselves, but on an order from another broker for a principal whose name they were not at liberty to disclose. *Woodward v. Davidson*, 150 Fed. 840; reversed, on another ground, 156 Fed. 915.

A real estate broker, having a customer desirous of purchasing property of a particular character, need not, before entering into negotiations to secure the agency from the seller to procure a purchaser of such property, disclose the facts to the owner that he has a customer and that he will probably effect a sale, no relation of agency existing between the broker and the customer. *Larson v. Thoma* (Iowa Sup. '09), 121 N. W. 1059.

Sec. 292. Abandonment of employment and of contract by purchaser.

Where a real estate agent fails to sell the property and directs a prospective purchaser to trade with the owner, who sells the property, relying on the broker's abandonment of the employment, the broker can not recover commissions. *Enocks v. Paxton*, 87 Miss. 660, 40 S. 14. A broker employed by the owner of land to secure a purchaser for it produced two persons who obtained a written agreement from the owner to sell the land to them, but did not sign the agreement, and afterwards abandoned the deal by refusing to take a deed. *Held*, that the

broker was not entitled to a commission. *Kampf v. Dreyer*, 103 N. Y. S. 962, 119 App. Div. 134. See Sec. 33.

A sale of property negotiated by a broker for \$38,000, provided for the payment in cash of \$500, a payment of \$4,500 on a later date, when the deed was to be delivered, and a mortgage for the remainder given, together with a bond for improvements to be placed on the property by the purchaser; on the date when the deed was to be given the purchaser was unable to comply with the contract, but paid \$3,000, and further time was granted; a few months later the purchaser, still being unable to comply with the contract, gave his note to the vendor for \$2,000, and the contract was cancelled. *Held*, that the broker was not entitled to commissions. *Riggs v. Turnbull*, 105 Md. 135, 66 A. 13, 8 L. R. A. (N. S.) 824. A broker who abandons his employment is not entitled to commissions on a sale afterwards made to his customer by the principal or through another agent. *Everett v. Farrel*, 11 Ind. App. 185, 38 N. E. 872; *Watts v. Howard*, 51 Ill. App. 243; *Lipe v. Ludwick*, 14 Ill. App. 372; *Singer, etc., Stone Co. v. Hutchison*, 61 Ill. App. 308; *Rigdon v. Strong*, 128 Ill. App. 447; *Moore v. Cresap*, 109 Iowa 749, 80 N. W. 399; *Cathcart v. Bacon*, 47 Minn. 34, 49 N. W. 331; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Cullen v. Bell*, 43 Minn. 226, 45 N. W. 428; *Tooker v. Duckworth*, 107 Mo. App. 231, 80 S. W. 963; *Barnard v. Monnott*, 34 Barb. (N. Y.) 90; *Meyer v. Straus*, 58 N. Y. S. 904, 42 App. Div. 613; *Getzler v. Boehm*, 38 N. Y. S. 52, 16 Misc. 390; *Bouscher v. Larkins*, 84 Hun 288, 32 N. Y. S. 305; *Hay v. Platt*, 21 N. Y. S. 362, 66 Hun 488; *Marcus v. Kenneally*, 43 N. Y. S. 1056, 19 Misc. 517; *Halley v. Townsend*, 2 Hilt. (N. Y.) 34; *Miller v. Vining*, 98 N. Y. S. 466, 112 App. Div. 304.

A mere refusal by the broker, at the request of the purchaser, to again see the seller and endeavor to obtain a lower price, does not constitute an abandonment of his employment, or bar commissions on a sale afterward made by the owner to such customer. *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171. Where the owner of property employed a broker to sell it, and after a month or two it was agreed that the broker's authority should cease, and three or four years after the owner sold the property to one with whom the broker had negotiated

with two years prior thereto, he was not entitled to commissions, although he called the attention of the purchaser to the property and introduced him to the owner. *Staehlin v. Kramer*, 118 Mo. App. 329, 94 S. W. 785.

Sec. 293. Alterations made in written instruments.

Where, after a contract of sale was signed by the vendor, the purchaser made material alterations and then signed it, and the vendor refused to re-execute, there was no meeting of minds and the broker can not recover commissions. *Bruce v. Hurlbut*, 66 N. Y. S. 1127, 54 App. Div. 616. See also Sec. 33. A contract for the sale of land was executed by the owner and left with his agent for the sale of such land for delivery to the purchaser; the agent altered the instrument by substituting the name of another person, changed both the consideration and the rate of interest, and delivered it to such other person. *Held*, that the contract so delivered was not the contract of the owner. *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10. See also Sec. 55.

Sec. 294. Adverse interests.

An agent in charge of real estate can not acquire a tax-title adverse to his principal, who has failed to furnish him with means to pay the taxes, and the burden is on the agent to show that his agency had terminated when he acquired the title. *Bowman v. Officer*, 53 Iowa, 640.

Sec. 295. Betrayal of trust.

If a real estate agent authorized to sell land at a given price, three years after, when the value has greatly advanced, and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing his principal of the rise in value, this would be such a fraud upon the principal that a court of equity would refuse to enforce a conveyance to the purchaser. *Proudfoot v. Wightman*, 78 Ill. 553.

In an action by a broker for commissions for procuring a purchaser, the broker made no pretence that defendant employed him, but asserted that he was acting at the instance of the purchaser; notwithstanding the express unwillingness of

defendant to make the sale, he testified that, without the knowledge of defendant, he called the purchaser's attention to his right to purchase as stipulated in the lease; that defendant refused to convey, claiming that she was not bound by the lease, that the broker urged the purchaser's claim, and that defendant yielded when advised by her counsel so to do. *Held*, that the broker was not entitled to commissions. *Morris v. Poundt*, 99 N. Y. S. 844, 51 Misc. 6; *Knake v. Griswold*, 93 N. Y. S. 459, 104 App. Div. 137; *Horten v. Loffler*, 31 App. D. C. 362.

In an action by a grantor of realty to set aside a sale, on the ground that the agent employed by her to secure a purchaser, in fact purchased the property, while she thought the sale was being made to another; it appeared that the agent had induced her to sign a contract of purchase with such other party, the agent agreeing to execute with the other a bond accompanying a mortgage which was to be given to the grantor; subsequently, a deed was given running to the agent; the bond was signed by the agent and the other, and the mortgage signed by the agent alone was kept by him for the purpose of record; after the grantor learned that the deed ran to the agent she informed him, on the payment of the interest on the purchase money and mortgage given by him, that she would put the money in bank until she got her property back, and stated that she was going to consult a lawyer. *Held*, that the acceptance of the money did not constitute a ratification of the transaction. *Clark v. Bird*, 72 N. Y. S. 769, 66 App. Div. 284.

Sec. 296. Collusion.

In an action for a broker's services, an answer alleging that the proposed purchaser was plaintiff's uncle, and that they entered into collusion, whereby the uncle was to pretend to defendant that he was ready and willing to purchase the lands and pay for the same in cash, and that defendant, under the belief that the proposed purchaser was acting in good faith fixed a day and place for the execution of the deed, when plaintiff and his uncle questioned the description for the purpose of delay, and that before the adjourned day fixed for the execution of the deed, defendant was informed that the proposed purchaser would not take the land until he had had an

opportunity to reinspect it, which he never did, states a sufficient defense. *McAfee v. Bending*, 36 Ind. App. 628, 76 N. E. 412.

Where throughout the transactions involving the sale of defendant's property by plaintiff, a broker, defendant believed that she was dealing with the purchaser alone, to whom her written contract of sale was executed and delivered, the facts that immediate assignment was made by the purchaser to another, followed by the procurement from defendant of a written ratification, with a modification giving to the assignee the right to a conveyance, and the payment by such assignee of the purchaser's check, given in part payment of the purchase price, were circumstances tending to support her claim that the contract was procured through the misrepresentations of all of the parties acting in concert. *Kurinsky v. Lynch*, 201 Mass. 28, 87 N. E. 70.

CHAPTER II.

SECTION.

297. Deposits.

298. Deceit.

299. Action for damages.

SECTION.

300. Measure of damages.

301. Clerks.

302. Conduct of broker.

Sec. 297. Deposits.

A real estate broker employed to find a purchaser of land at a designated price, under an agreement whereby the owner is to furnish a perfect abstract of title on a deposit of ten per cent. of the price by the purchaser has earned his commissions when he produces a purchaser willing to buy on the prescribed terms, and where the owner afterwards induces his title to be rejected for the purpose of defeating the sale, the broker's return of the deposit in compliance with the contract of sale, though without the owner's knowledge, does not affect his right to his commission. *Phelps v. Preuesch*, 83 Cal. 626, 23 P. 1111. A real estate broker acting for a vendor is entitled, in the absence of a contract to the contrary, to a commission on a deposit made by the prospective purchaser and forfeited by him. *Pierce v. Powell*, 57 Ill. 323; *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 590, 20 L. R. A. 398; *Bowersox v. Hall*, 73 Kan. 99, 84 P. 557. See also Secs. 470, 570.

Sec. 298. Deceit.

Where plaintiff purchased property from defendant, a broker, for \$7,000, upon his representation that the owner would not sell it for less than that price, when the fact was that the owner had consented to sell it for \$6,500, and the broker's commission, plaintiff can recover in an action in deceit, \$500, less a reasonable commission to defendant. *Kice v. Porter*, 21 Ky. L. R. 871, 22 Ky. L. R. 1704, 53 S. W. 285, 61 S. W. 266.

Defendant asked a real estate broker to obtain a purchaser for his farm, which the broker did, at the same time demanding

large commissions, which, he said, were to be divided between him and the purchaser's broker, as the purchaser knew; this was satisfactory to defendant, but he wrote as to the commission to the purchaser, who thereupon refused to sign the contract of sale. *Held*, that the broker did not procure a purchaser on defendant's terms, and was not entitled to commissions. *Smith v. Nicoll*, 36 N. Y. S. 347, 91 Hun 173, affirmed 158 N. Y. 696, 53 N. E. 1132.

Where a real estate broker, in order to make a sale, represented that an assessment for a sewer in process of construction near the property had been paid, the owner is not liable therefor in an action for deceit, in the absence of evidence that he gave the broker authority to make such representation, it not being within the ordinary scope of his employment. *Brackman v. Leighton*, 60 Mo. App. 38.

An innocent vendor can not be sued in tort for the fraud of his agent in effecting a sale; in such a case the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in *assumpsit* for it, or he may sue the agent for the deceit. *Kennedy v. McKay*, 43 N. J. L. 288.

Plaintiff employed defendant as its agent to buy a mine for not to exceed \$150,000. Defendant actually bought it for \$90,000, concealed the fact from plaintiff, fraudulently caused it to be conveyed to a confederate and by representing that he had bought it for \$150,000, induced plaintiff to execute a contract with the confederate, agreeing to buy the mine at that price, \$20,000 to be paid in cash, \$90,000 in one year, and \$40,000 in eighteen months; plaintiff paid the cash payment, and after obtaining a reduction of the remainder to \$110,000, paid that sum also; thus, by reason of defendant's fraud paying \$40,000 more than the actual price for which defendant purchased for his account. *Held*, that these facts alleged and found sufficiently made out a case of damages for deceit and fraud, and entitled plaintiff to a judgment recovered for \$40,000. *Gt. Western Gold Co. v. Chambers* (Cal. Sup. '09), 101 P. 6.

A broker employed by the owner to procure a purchaser of real estate was entitled to retain for his services the sum in excess of \$10,000 realized from a sale. The broker fraudulently induced a purchaser to purchase the land for \$12,500, and

fraudulently induced the purchaser to sell his own land to the broker, who agreed to pay \$2,527 to the owner to apply on the price of the land purchased from the owner. *Held*, that the purchaser, electing to rescind the contract on the ground of fraud, could not recover the \$2,500 as an element of damages in an action of deceit against the broker. *Gordon v. Rhodes* (Tex. Civ. App. '09), 117 S. W. 1023. Certified questions answered, 116 S. W. 40.

Sec. 299. Action for damages.

Where a broker is employed to purchase or to make a sale of lands and the principal refuses to accept or to part with the property, as the case may be, or otherwise breaks the contract of employment, the broker may maintain an action for a breach of the contract. *Atkinson v. Peck*, 114 N. C. 597, 19 S. E. 628; *Roberts v. Barnes*, 1 Cab. & E. (Eng.) 336; *Burnet v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Henry & Sons v. Colo. F. & L. S. Co.*, 164 F. 986.

Although as a general rule a contract with an agent to sell land, within a certain time, is revocable before the termination of the time specified, yet if the agent has rendered service in relation thereto, he may sue the principal for a breach of the contract and recover damages. *Green v. Cole*, 103 Mo. 70, 15 S. W. 317; *Durkee v. Gunn*, 41 Kan. 496, 21 P. 637; *Bathrik v. Coffin*, 43 N. Y. S. 313, 13 App. Div. 101; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Tappin v. Henley*, 11 Weekly Rep. (Eng.) 466. See also Sec. 22.

Where a real estate agent having a contract to sell lands to a third person at an advanced price purchases the land himself for his principal, without disclosing to him that such is the contract, which he thereafter completes, renders himself liable to his principal in damages. *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543.

An owner of land, which his agent has sold, can not recover damages from that agent for fraud, where such owner, knowing of a resale by the vendee and suspecting his agent of connivance in said resale at an advanced price, refuses, while the contract is still executory, to avail himself of the usual means of ascertaining the truth, and, nevertheless, executes the contract. *Ber-*

tleeson v. Vanderhoff, 96 Minn. 184, 104 N. W. 820. See also Sec. 24.

Where a contract employing a broker to procure a purchaser stipulates that the commissions shall be paid only when a sale is effected, the broker is not entitled to commissions unless a sale is effected, though he may be entitled to damages for the wrongful act of the owner in preventing a sale. *McDermott v. Mahoney* (Iowa Sup. '08), 115 N. W. 32, 139 Iowa 292; affirming on rehearing, 106 N. W. 925.

An action for damages will lie against a real estate agent delivering a contract for the exchange of property to the other party, in violation of the principal's instructions. *Hawes v. Burkholz*, 114 N. Y. S. 765.

Where a real estate broker is employed for a definite period to procure a purchaser for the property of the owner, and the broker is discharged without cause, before the expiration of the period, or is not permitted to undertake the performance of the contract, the owner is liable to the agent for the damages. *Johnson v. Buchanan* (Tex. Civ. App. '09), 116 S. W. 875. A broker may recover anticipated profits as damages for breach of his contract of employment. *Blumenthal v. Bridges* (Ark. Sup. '09), 120 S. W. 974.

Where the buyer of real estate receives a deed therefor, with special warranty against incumbrances, and pays over the purchase price to the brokers of the seller, the buyer can recover on such warranty from the seller, where it develops that the brokers thereafter accounted to the seller for the difference between an existing incumbrance on the property and the purchase price, but fraudulently failed to pay and secure a release of such incumbrance. *Babson v. Cox*, 32 App. D. C. 542.

Defendant employed plaintiff to procure an exchange of land of defendant's to a third person. It was orally agreed that the third person should pay plaintiff his commission, and the contract between defendant and the third person for the exchange was also oral. Defendant refused to consummate the exchange and plaintiff lost his commission. *Held*, that as the oral contract for the exchange of real estate, though unenforceable, under the statute of frauds, may be lawfully performed, the fact that the third person could not enforce the agreement

did not deprive plaintiff of his action for damages against defendant for the loss of his commissions. *Bird v. Blackwell* (Mo. App. '09), 115 S. W. 487.

If the vendor's broker misrepresented the acreage, and the purchaser relied on the representations, the purchaser can recover compensation for any material shortage, not exceeding the price per acre paid. *Farris v. Gilder* (Tex. Civ. App. '09), 115 S. W. 645.

Sec. 300. Measure of damages.

A real estate agent who undertakes to sell the realty of his principal without legal authority to bind such principal, does not render him responsible for any defect in the title of the principal. In the absence of evidence of other damages the measure of the agent's liability to the purchaser in such case is the excess of the market value of the principal's title, whether good or bad, over the contract price. *Gestring v. Fisher*, 46 Mo. App. 603.

In an action against an agent for fraudulent representations as to the location of real estate sold by him to plaintiff, after a disaffirmance of the contract, the measure of damages is the actual loss sustained, and not the difference between the actual value of the property conveyed and the price. *Roberts v. Holiday*, 10 S. D. 576, 74 N. W. 1034; *Duncan v. Holder* (N. M. '10), 107 P. 685.

A contract authorized the plaintiffs to sell a tract of land of seven thousand acres, and provided that the tract should be subdivided, and an asking price agreed on for the smaller tracts; plaintiffs were to have five per cent. for lands sold at the minimum price, and one-half of the excess for those sold above that price, but no commissions on the value of the improvements; plaintiff sold and defendant conveyed to the purchasers large quantities of the land, but he revoked the contract before all the land had been surveyed or the time expired. *Held*, that it was not contemplated that the land should all be surveyed and subdivided before sales were made, and the fact that it had not all been surveyed did not authorize revoking the contract; it appearing that plaintiff would probably have sold all the lands within the time limited, their damages should be com-

puted at one-half the difference between what the lands would have brought at the average price of that already sold and the minimum price, excluding the two hundred acres with the improvements, and deducting the probable expense of selling and the amount already paid by defendant. *McLane v. Maurier*, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108.

In order to entitle the prospective purchaser of a lot to damages from an agent for his breach of his contract of agency to purchase the lot, the damages must be such as are the probable and natural result of the breach, and where the defendant was to purchase the lot for plaintiff at not to exceed a certain price, and purchased it at a less price, and took the title in his own name and refused to transfer it to plaintiff, whose purpose in buying the lot was to erect a sanitarium thereon, plaintiff can not recover as damages the difference in the price of material and labor between the date of the contract and the time of the suit, time being not of the essence of the contract, and plaintiff having at the time no contract for the building at a fixed price, and there being no allegation or proof that defendant knew that the price of labor and material was going up, or that plaintiff was bound by a contract to build, which he was to perform within a certain time, those damages are, under the circumstances, too remote and speculative to be attributed to defendant's breach of the contract. *Harrison v. Craven*, 188 Mo. 590, 87 S. W. 962.

In an action for damages for the revocation of authority to sell land, nothing more than nominal damages can be recovered, when the agent fails to show that he could have made a sale on the principal's terms. *Milligan v. Owens*, 123 Iowa 285, 98 N. W. 792.

In the case of a breach by a vendor of his contract to convey, the measure of plaintiff's damages is the amount which he would have received as compensation had defendant complied with his contract. *Atkinson v. Peck*, 114 N. C. 597, 19 S. E. 628; *Young v. Metcalf Land Co.* (N. D. Sup. '09), 122 N. W. 1101. Where an agent in completing a contract for his principal for the sale of her real estate, secures the agreed compensation, with the exception of taking a different security for the deferred payment amounting to \$730 and interest, the

measure of damages resulting to the principal from the act of the agent is the difference in value between the security contracted for and that recovered, not exceeding \$730. *Lunn v. Guthrie*, 88 N. W. 1060, 115 Iowa, 501; *Hindrick v. Brady* (S. D. Sup. '09), 121 N. W. 777.

For the breach of a contract to pay a real estate agent a specified sum as commissions for finding a purchaser, the measure of damages is the commission agreed to be paid. *Tuffree v. Bindford*, 130 Iowa 532, 107 N. W. 425. Where a broker employed to sell land was to receive as his compensation anything that he could obtain for the land above a specified sum, in an action against the landowner for failure to perform the contract with the purchaser produced by plaintiff, the measure of damages was the amount of the commissions earned and lost. *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313. The measure of damages for the breach of a contract employing a broker to sell land is either the compensation fixed by the contract, or a reasonable compensation for his services. *Dal v. Fisher* (S. D. Supreme '06), 107 N. W. 534; *Hancock v. Stacey* (Tex. Sup. '10), 125 S. W. 884; *Johnson v. Buchanan* (Tex. Civ. App. '09), 116 S. W. 875.

The expenses incurred by the broker in advertising and selling a client's land are not elements of damages, in an action to recover commissions alleged to have been lost by his client's refusal to convey to the purchaser whom the broker had obtained, and hence the admission of evidence of such expenses is prejudicial error. *Burnet v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775. In an action by a real estate broker for commissions, it was error to tell the jury, in answer to questions by their foreman, that they were not bound by any rule in fixing damages, as the court should have charged them that the rule was the customary commissions in such cases, or if the evidence was insufficient on that ground, what would be a fair compensation. *Hartman v. Warner*, 75 Conn. 197, 52 A. 719. Defendant prior to his purchase of certain land contracted to pay plaintiff, who negotiated the purchase, one-third of the profits to be derived from a subsequent sale thereof, no time for the sale was fixed, and defendant having died without

making a sale, his personal representative repudiated the plaintiff's interest and refused to sell, though the property had largely increased in value. *Held*, that decedent under the contract was required to make a sale within a reasonable time, and after repudiation of plaintiff's rights, he was entitled to recover one-third of the value of the land in cash, after deducting the purchase price, taxes and interest. *Kaufman v. Bailie*, 46 Wash. 248, 89 P. 548.

Where a broker employed by the owners of land to effect a sale thereof, pretending to act for the principal, made a contract to sell the land to plaintiff's assignor, which was not binding on the owners, and plaintiff's assignor paid \$200 on the contract, plaintiff can recover, in an action for damages on the broker's warranty of authority as agent to sell. *Rowland v. Hall*, 106 N. Y. S. 55, 121 App. Div. 459.

Where, in an action for a division of a broker's commissions defendant agreed to pay plaintiff one-half of the commissions earned on the sale, and defendant admitted receiving \$287.50, it was proper for the court to assess the plaintiff's damages at one-half of such sum. *McCleary v. Willis*, 35 Wash. 676, 77 P. 1073.

Where, in an action by a broker for his share of the profits derived from a sale procured by him of a mine under an agreement to divide "in such proportion as would be just and right;" the evidence was in irreconcilable conflict as to the customary division, many witnesses testifying that the usual division was fifty per cent., while others testified that the customary division varied from two and one-half to ten per cent. of the net profits, a decree allowing ten per cent. was proper. *Law v. Seeley*, 37 Wash. 166, 79 P. 606.

Where a broker was employed to sell certain land for \$75,000, at a commission of \$2,000, and after he had interested a purchaser his authority was revoked and the land was sold by his employer for \$65,000, plaintiff was entitled to recover only his contract commissions, with interest thereon, and not the customary commissions or reasonable value of his services. *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055, 13 D. L. N. 853; *Finck v. Pierce*, 103 N. Y. S. 765, 53 Misc. 554.

Where a real estate agent delivered a contract for the ex-

change of property to the other party, in violation of his principal's instructions, the damage sustained by the principal in consequence of his refusal to perform the contract, and the expense of defending a suit by the other party's assignee for breach of the contract, and of a suit by the agent for commissions, are proper elements of recovery. *Hawes v. Burkholz*, 114 N. Y. S. 765.

Where a principal makes sales of land within the time for which he had listed it with a broker, the measure of the broker's recovery is the profit he would have realized if he had been permitted to perform. *Blumenthal v. Bridges* (Ark. Sup. '09), 120 S. W. 974. *Contra, Milligan v. Owens*, 123 Iowa, 285, 98 N. W. 792.

In an action by a broker for compensation for procuring a purchaser before his authority to sell was wrongfully revoked, where the jury, on sufficient evidence, awarded the same amount that the parties had agreed on in case of sale, it is immaterial whether the contract price or the value of the services rendered should have been applied in ascertaining the damages. *Hancock v. Stacy* (Tex. Sup. '10), 125 S. W. 884.

Where a broker sued on his contract for commissions, his damages were limited to those he sustained by breach of the contract, and he was not entitled to any part of the profits made by defendants on a subsequent sale of the land. *Montgomery v. Amsler* (Tex. C. A. '09), 122 S. W. 307.

Sec. 301. Clerks.

A contract whereby for a consideration moving from a third person, a clerk agrees to induce his employer to accept a lower price for property about to be sold than was first asked, can not be enforced, in the absence of a showing that the employer knew that his clerk was serving the interests of the purchaser, such a contract being against good morals. *Summers v. Cary*, 74 N. Y. S. 980, 69 App. Div. 428.

Where the clerk of a broker employed to make a sale of land, who has access to the correspondence between his principal and the vendor, purchases the land himself, though the price paid be fair, and there is no actual fraud, he will be compelled at the suit of the vendor to reconvey such portion of the land as

remains in his hands, and to account for the proceeds of what he has sold. *Gardner v. Ogden*, 22 N. Y. 327.

Sec. 302. Conduct of broker.

In an action to recover commissions for finding a purchaser it appeared that the contract provided that the terms of payment should be \$10,000 within five days, \$5,000 additional on promises, etc., that at eight o'clock in the morning of the last day for making a sale, as provided by the contract, plaintiffs and one B. met defendants, and B. offered himself as a purchaser and tendered a check for \$10,000 as the first payment; that the check was declined by defendant as not equivalent to money, whereupon they were informed that the money would be produced on the opening of the bank; that defendants said they would allow until 10 o'clock, and plaintiffs and B. endeavored to tender payment to defendant, but were eluded all day by the latter, and at 10 o'clock defendant sold the land to another person; B. had made no written contract for the purchase of the land. *Held*, that defendants were liable. *Oullahan v. Baldwin*, 100 Cal. 648, 35 P. 310.

CHAPTER III.

SECTION.

- 303. Debt of another.
- 304. Discretion.
- 305. Double liability.
- 306. Double capacity.
- 307. Contract in excess of authority vested in agent.
- 307a. Contract of broker varying from instruction will not be enforced.
- 307b. An agent who enters into a contract without authority or who exceeds same, binds himself.

SECTION.

- 307c. Broker not entitled to commissions when lots were sold out of order.
- 308. Exoneration.
- 309. Expenses.
- 310. Employment of engineer.
- 311. Fiduciary relations.
- 312. Failure of broker to report offer.
- 313. False representations.

Sec. 303. Debt of another.

Plaintiff, as broker, sold property of S. to C., and defendant was employed to draw a contract of sale, but on finding that S. had failed, defendant postponed drawing the contract, and later, though without title, he contracted with C. to sell him the property, and received from C. part of the price which he handed to S., whereupon title was transferred to him, and he made a conveyance to C.; defendant at no time had any personal interest in the property, and acted solely as the agent of C. for the purpose of transfer, and did not employ plaintiffs, nor agree to pay them a commission; but before the title vested in defendant he told one of the plaintiffs that "the matter would go through," that he was the owner of the property, and would make the contract himself, and if plaintiffs were anxious he would then pay half of the commissions in lieu of the whole when the contract was closed. *Held*, that the promise to pay plaintiff was either a parol promise to pay another's debt, or an original promise, without consideration, and therefore void. *Smythe v. Mack*, 19 N. Y. S. 347, 64 Hun, 639.

Sec. 304. Discretion.

A power to sell "the one-half" of a lot of land, without specifying which, or whether an undivided one-half, empowers the attorney to sell one-half in severalty, and to exercise his own discretion as to which half. *Aleman v. Daly*, 36 Cal. 90. Where the plaintiff alleged an agreement whereby he was to sell certain land for enough cash to confirm the sale, meaning thereby enough to make the land good for the deferred payment, and the balance to remain on time, it is not error to overrule the defendant's objection that it is not a matter of law how much cash confirms a sale, for such a power carries with it some discretion. *Taylor v. Cox* (Tex. Sup. 1887), 7 S. W. 69; *Smith v. Keller*, 151 Ill. 518. 38 N. E. 250; *Bourke v. Van Keuren*, 20 Colo. 95, 36 P. 882.

Sec. 305. Double liability.

Where a purchaser is produced and a sale consummated by one of two brokers who have the property for sale, and a commission paid him by the owner, the fact that the other broker has, by advertising, found a customer, and by interviews induced him to make the purchase, will not make the owner liable to him also. *Daniels v. Columbia Heights Ld. Co.*, 9 App. Cas. (D. C.) 483; *Winans v. Jacques*, 10 Daly (N. Y.) 487.

An instruction that an employer of two or more real estate brokers may make a sale to a buyer produced by either, and is not bound to decide which is the primary cause of the purchase, is properly refused when the evidence shows that the employer of two brokers, sued by one of them, had full notice that he was the procuring cause of the sale. *Eggleston v. Austin*, 27 Kan. 245. The court properly charged that, as there are different kinds of sales of land, and such contract does not specify the kind, it is for the jury to determine from the evidence and the letters forming the contract, and the attending circumstances, as to whether it included only the auction sales, or both auction and private sales, for which plaintiff was to receive a commission. *Coolican v. Mil. & S. St. M. Im. Co.* 79 Wis. 471, 48 N. W. 717.

Defendant, living in New York, placed a farm in the hands of plaintiff and S., two different real estate agents in Winnipeg

for sale. Plaintiff found a purchaser at \$12 per acre in cash, and informed defendant by letter. Defendant replied, accepting the offer, and asking plaintiff to call on S. and arrange regarding commissions, so as to avoid having to pay more than one commission. Plaintiff did not communicate with S., but introduced his purchaser to defendant's solicitor in Winnipeg. This purchaser paid the solicitor \$500 on account, and was ready and willing to pay the balance, on receipt of the transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by defendant, who paid S. the usual commission. *Held*, that the plaintiff was entitled to his commission, as he had done all that was necessary to earn it. *Bell v. Rokeby*, 15 Manitoba, 327.

Sec. 306. Double capacity.

The law will not permit a man to act in the double capacity of principal and agent. *Dwight v. Blackmar*, 2 Mich. 330. Where the owner of land agreed to sell it to real estate brokers, who at first stated that they were acting for themselves, but afterwards, before the contract was made, stated that they were acting as brokers, and the contract was made to a third person, proof of their employment before the making of the contract was not essential to their right to commissions. *Shapiro v. Shapiro*, 103 N. Y. S. 305, 117 App. Div. 817.

Sec. 307. Contract in excess of authority vested in agent.

Where defendant authorized his agent to sell his farm for a certain sum, the first payment to be made on February 1st, a contract requiring the first payment to be made on March 1st, and obligating defendant to furnish an abstract of title, to pay taxes, payable after the purchaser was to take possession, and to credit on the price any insurance he might receive in consequence of the building on the land burning, was in excess of the agent's authority, and not binding on defendant. *Strong v. Ross*, 33 Ind. App. 586, 71 N. E. 819; *Staten v. Hammer*, 121 Iowa 499; 96 N. W. 964; *Fleming v. Burke*, 122 Iowa, 433, 98 N. W. 288; *Planer v. Equitable L. A. Soc.* (N. J. Ch. '97), 37 A. 668; *John Gund Brewing Co. v. Tourtelott* (Minn. Sup. '09), 121 N. W. 417; *Larson v. Newman* (N. D. Sup. '09), 121 N. W.

202; *Turner v. Baker*, 225 Pa. 259, 74 A. 172; *Deming Inv. Co. v. Coolidge* (Colo. Sup. '09), 104 P. 392; *Rand v. Conkrite*, 64 Ill. App. 208; *Sattler v. Oliver*, 138 Ill. 200, affirmed 233 Ill. 536, 84 N. E. 652. See Secs. 310, 324, 330, 337, 337b, 339, 340, 342, 343, 354, 355, 363, 364, 372, 373, 381, 386, 427, 547, 548, 549, 597.

Sec. 307a. Contract of broker varying from instructions will not be enforced.

Where a broker to sell has power to sign a contract, if the contract signed by him varies from his instructions, the principal will not be bound by it, and it will not be specifically enforced against the latter. *Morris v. Ruddy*, 20 N. J. Eq. 236. See also reference under Sec. 307.

Sec. 307b. An agent who makes a contract either without authority or in excess of authority given, binds himself.

An agent who makes a contract either without authority or or in excess of authority, binds himself. *Moore v. Wilson*, 26 Foster (N. H.) 332; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Roberts v. Button*, 14 Ver. 195; *Royce v. Allen*, 28 Ver. 234; *Bank of Hamburg v. Way*, 4 Strobb. (S. C.) 87; *Layny v. Stewart*, 1 W. & S. (Pa.) 222; *Feeter v. Heath*, 11 Wend. (N. Y.) 478.

Sec. 307c. Broker not entitled to commissions where lots were sold out of the order provided for.

Persons employed to sell certain lots of land at prices named in a written contract of employment, the lots to be sold only in the order enumerated in the contract, were not entitled to commissions for procuring a purchaser of lots not in their order, though the owner's refusal was not based on that ground. *Stearns v. Jennings*, 128 Wis. 379, 107 N. W. 327. See also Sec. 340.

Sec. 308. Exoneration.

A broker, through negligence, loaned on second mortgage some money which, for compensation, he had undertaken to loan on first mortgage security, but before the loan became due

the lender, with other creditors of the borrower, signed a composition releasing him from personal liability beyond the lien of the mortgage. *Held*, that this released the broker from his contingent liability to the lender. *Nicolai v. Lyon*, 8 Ore. 56.

Sec. 309. Expenses.

A real estate agent who is merely promised a commission for making a sale, is not also entitled to recover for expenses incurred in procuring a purchaser. *Reynolds-McGuinness Co. v. Green*, 78 Vt. 28, 61 A. 556. See also Sec. 561.

Where a real estate broker fraudulently induced his principal to trade property on a valuation of \$4,400, and sold it for \$5,750, in an action by the principal against the broker for the difference, the latter could not recoup the amount of expenses incurred in making the sale, nor a portion of the profit paid to one who was associated with him in the fraud. *Van Raulte v. Epstein*, 202 Mo. 173, 99 S. W. 1077.

A real estate agent, having property of others for sale, who requests a prospective buyer to go with him to see the property, can not charge the latter for his services and expenses in making such trip. *Hale v. Knapp*, 134 Mich. 622, 96 N. W. 1060.

Where plaintiff was to have the proceeds of sale after payment of the debts and the agreed broker's commissions, charges for traveling expenses and a sub-agent's fees in making the sale would be included in the commission. *Lyttle v. Goldberg*, 131 Wis. 613, 111 N. W. 718.

Sec. 310. Employment of engineer.

It is not within the scope of the authority of persons employed to collect the rents of a building to employ an engineer to take charge of the engine therein; a general agent having charge of this matter, and of the building generally, can not delegate his authority to others. *Crozier v. Reins*, 4 Ill. App. 564. See reference under Sec. 307.

Sec. 311. Fiduciary relations.

One who undertakes to collect rents and exercise control over property occupies a fiduciary relation which forbids placing

himself in antagonism to his principal with respect to such property. *Grumley v. Webb*, 44 Mo. 444.

In ejectment defendant claimed an equitable title; plaintiff's testator A., formerly owned the land and placed it with F. to sell, who entrusted it, with A.'s consent, to defendant; in a short time defendant wrote to F. that he had an offer, and enclosed a deed for A. to sign, with the name of the grantee omitted; on return of the deed signed and acknowledged, defendant inserted his own name as grantee and forwarded a check to F. for the price, who cashed the check and credited A.'s account; the deed was void because of the failure to insert the grantee's name before delivery. *Held*, that on account of the defendant's fiduciary relations to A. he took no equitable title. *Burke v. Bours*, 92 Cal. 108, 67 Cal. 447, 28 P. 57, 8 P. 49.

The relations between an agent for the sale of land and his principal are of a fiduciary nature, and the agent's acts in the course of his employment are governed by the same rules as those of a trustee. *Butler v. Agnew* (Cal. App. '08), 99 P. 395.

The owner of certain mineral land authorized plaintiffs to sell the same for \$2,000, they to receive for their services all over that amount they obtained. F. contracted with the plaintiffs to make the sale and receive half of the profits. F. thereafter formed a corporation to buy the land, representing that the price to be paid the owner was \$5,000, and that he was to receive ten per cent. thereof for making a sale. A sale was made, \$3,000 being paid in cash, of which plaintiffs recovered \$500, and a note for \$2,000 being given by the corporation to the owner of the land for the balance. *Held*, that F. sustained a fiduciary relation to the corporation, and it was entitled to the land for the price actually paid to the owner, and hence plaintiffs were not entitled to recover any part of the amount agreed to be paid by the note. *Tagarden Bros. v. Big Star Zink Co.*, 71 Ark., 277, 72 S. W. 989.

Sec. 312. Failure of broker to report offer.

Where a broker who received a proposition to sell defendant's land did not accept it until after the expiration of the time designated in the offer for its acceptance, he is not entitled to

commissions on the making of the sale. *Short v. Willing*, 1 Weekly Notes of Cas. (Pa.) 460. See also Secs. 235, 431, 471.

Sec. 313. False representations.

Where defendant authorized plaintiff to sell real estate, agreeing to pay a commission, and in a printed form above the authorization set out particulars of the property, the selling price as \$52,000 and the annual rental as \$5,325, and plaintiff procured a purchaser ready, able and willing to buy on defendant's terms, the price being reduced to \$49,500, and the customer was accepted, and the sale fell through only because defendant had misrepresented the amount of annual rental, plaintiff was entitled to commissions. *Goodman v. Hess*, 107 N. Y. S. 112, 56 Misc. 482. *Contra*, *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 447. Compare Sec. 183.

A real estate broker employed to procure a purchase of premises for \$8,000 in cash and assumption of two mortgages, one having two years to run and the other payable in installments extending over a period of seven years, procured a purchaser who agreed with the owner for the purchase of the premises and to pay \$7,900 in cash and to assume the mortgages as described; the mortgages matured a year earlier than had been represented by the owner; the purchaser insisted on a formal contract embodying the terms accordingly, and the owner refused to execute such a contract; the purchaser was able to complete the purchase. *Held*, that the broker was entitled to his commissions. *Frank v. Connor*, 107 N. Y. S. 132.

Where a broker, knowing of the existence of an incumbrance and contrary to his instructions executes an agreement for a sale free from incumbrances, and deceives his principal as to its contents, he can not recover commissions. *Culp v. Powell*, 68 Mo. App. 238. See also Sec. 183.

If an agent effects a sale of the land of his principal by false representations, or other fraud, without the authority or knowledge of the principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized it. *Law v. Grant*, 37 Wis. 548; *Farris v. Gilder* (T.

C. A. '09), 115 S. W. 645; *Stelting v. Bank of Sparta*, 117 N. W. 798, 136 Wis. 369.

Where a contract for the purchase of land accorded to the purchaser the right to "back out" on paying a forfeiture, the vendor can not recover damages from the agents on account of their having, by false representations, induced the purchaser to forfeit the contract. *Hetzler v. Morrell*, 82 Iowa, 562, 48 N. W. 938.

CHAPTER IV.

FRAUD.

SECTION.

314. Fraud of broker against his principal.
315. Fraud of broker against third persons.
316. Fraud of sub-agent.
317. Fraud of principal against broker.

SECTION.

318. Fraud of third persons against broker.
319. Fraud of principals *inter se*.
320. Debatable acts of broker not constituting fraud.
321. Points of practice in actions for fraud.

Sec. 314. Fraud of broker against his principal.

If a broker is guilty of fraud in executing his agency his right to commissions is forfeited. *Jeffries v. Robbins*, 66 Kan. 427, 71 P. 852; *Kurinsky v. Lynch* (Mass. Sup. '09), 87 N. E. 70; *Krhut v. Phares*, 80 Kan. 515, 103 P. 117; *Whaples v. Fahy*, 87 N. Y. App. Div. 518, 84 N. Y. S. 793; *De Armet v. Milner*, 20 Pa. Super. Ct. 369; *Hall v. Gambrill*, 92 Fed. 32, 34 C. C. A. 190; *Schleifanbaum v. Rundbaken*, 81 Conn. 623, 71 A. 899.

In one case it was held that a broker employed to find a buyer is guilty of fraud when he seeks to induce the principal to reduce the price. *Hobart v. Shelburne*, 66 Minn. 171, 68 N. W. 841. *Contra*, *Gorman v. Hayes*, 6 Okla. 360, 50 P. 92. See also Secs. 290, 291, 1046a. A broker may be deprived of his right to commissions by the fraudulent conduct or misrepresentations of third persons in privity with him. *Thwing v. Clifford*, 136 Mass. 482. If a broker conceals the purchaser's name and puts forward a fictitious purchaser, it constitutes a fraud in law, and deprives him of his right to commissions for procuring a buyer. *Pratt v. Patterson*, 12 Phila. (Pa.) 460, 112 Pa. St. 475.

A broker who acts secretly for both parties to an exchange, purchase, sale or lease of property is guilty of fraud which

deprives him of the right to recover commissions from either party. *Tigarder v. Big Stone Zinc Co.*, 71 Ark. 277, 72 S. W. 789; *Deutsch v. Baxter*, 9 Colo. App. 58, 47 P. 405; *Hanesley v. Monroe*, 103 Ga. 279, 29 S. E. 928; *Van Vlissingen v. Blum*, 92 Ill. App. 145; *Hampton v. Lackens*, 72 Ill. App. 442; *Boyd v. Dillingham*, 33 Ill. App. 266; *Simonds v. Hoover*, 35 Ind. 412; *Blake v. Stump*, 73 Md. 160, 20 A. 788, 10 L. R. A. 103; *Rice v. Wood*, 113 Mass. 133; *Walker v. Osgood*, 98 Mass. 348; *Farnsworth v. Hemmer*, 1 Allen (Mass.), 494; *Rosenthal v. Drake*, 82 Mo. App. 358; *Chapman v. Currie*, 51 Mo. App. 40; *Strowbridge v. Swan*, 43 Neb. 281, 62 N. W. 199; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90; *Robinson v. Clock*, 55 N. Y. S. 976, 38 App. Div. 67; *Southack v. Lane*, 65 N. Y. S. 629, 32 Misc. 141; *Perkins v. Brainerd Quarry Co.*, 32 N. Y. S. 230, 11 Misc. 328; *Platt v. Baldwin*, 2 N. Y. City Ct. 281; *Capener v. Hogan*, 40 O. St. 203; *Hann v. Bretler*, 107 N. Y. S. 78; *Bell v. McConnell*, 37 O. St. 396; *Connell v. Smith*, 142 Pa. St. 25, 21 A. 793, 12 L. R. A. 395; *Lynch v. Faller*, 11 R. I. 311; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Shepard v. Hill*, 6 Wash. 605, 34 P. 159; *Meyer v. Hanchett*, 39 Wis. 419; *Bellin v. Wein*, 104 N. Y. S. 360. Mechem on Ag. Secs. 37, 38.

Unless the principals knew of the duplicate agency and consented thereto or acquiesced therein. *Hanesley v. Monroe*, 103 Ga. 279, 29 S. E. 928; *Boyd v. Dillingham*, 33 Ill. App. 266; *Gann v. Zetler*, 3 Ga. App. 589, 60 S. E. 283; *Rice v. Wood*, 113 Mass. 133; *Walker v. Osgood*, 98 Mass. 348; *Farnsworth v. Hemmer*, 1 Allen (Mass.), 494; *Redmund Bros. v. Hooks*, 137 Iowa, 228, 114 N. W. 885; *Rosenthal v. Drake*, 82 Mo. App. 358; *Chapman v. Currie*, 51 Mo. App. 40; *Strowbridge v. Swan*, 43 Neb. 781, 62 N. W. 199; *Dennison v. Gault*, 132 Mo. App. 301, 111 S. W. 844; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90; *Lansing v. Bliss*, 33 N. Y. S. 310, 86 Hun, 205; *Bonwell v. Auld*, 27 N. Y. S. 936, affirmed 29 N. Y. S. 15, 9 Misc. 65; *Bonwell v. Howes*, 1 N. Y. S. 435; *Bellin v. Wein*, 104 N. Y. S. 360; *Platt v. Baldwin*, 2 N. Y. City Ct. 281; *Willner v. Scale*, 111 N. Y. S. 699, 127 A. D. 180; *Capener v. Hogan*, 40 O. St. 203; *Bell v. McConnell*, 37 O. St. 396; *Evans v. Rockett*, 32 Pa. Super. Ct. 365; *Connell v.*

Smith, 142 Pa. St. 25, 21 A. 793, 12 L. R. A. 395; *Sullivan v. Tufts* (Mass. Sup. '09), 89 N. E. 239; *Lynch v. Faller*, 11 R. I. 311; *Meyer v. Hanchett*, 39 Wis. 419; *Selevar v. Isle Harbor Ld. Co.*, 91 Minn. 451, 98 N. W. 344; *Lakin v. Nordyke*, 66 Iowa, 471; *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674; *Berry v. Schmidt*, 57 N. W. 172; *Zimmerman v. Garvey*, 81 Conn. 570, 71 A. 780; *Arthur v. Porter* (Tex. Civ. App. '09), 116 S. W. 127; *Grasinger v. Lucas* (S. D. Sup. '09), 123 N. W. 77; *Lipscomb v. Mastin* (Mo. App. '10), 125 S. W. 1177.

If a broker has an individual interest in the transaction he is employed to negotiate, and fails to disclose the fact to the principal, this constitutes a fraud which deprives him of the right to compensation for his services. *Collins v. McClurg*, 1 Colo. App. 348, 29 P. 299; *Jeffries v. Robbins*, 66 Kan. 427, 71 P. 852; *Buck v. Hozeboom* (Neb. Sup. '02), 90 N. W. 635; *Ryan v. Kahler* (Tex. Civ. App. '98), 46 S. W. 71; *DeL'Archerie v. Rutherford* (Wash. '09), 102 P. 1033. If a broker in negotiating a contract practices fraud on the owner, and the other party is privy thereto, or has knowledge thereof, the owner is not bound thereby, and it was not necessary in a suit to recover the lands that the owner should offer to restore what he had received before he could demand restitution. *Healey v. Martin*, 68 N. Y. S. 413, 33 Misc. 236.

Where the broker for the purchaser also represents the vendor, the transaction is not binding, irrespective of actual fraud, without the intelligent consent of both parties. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

Where defendant contracted for a sale of land through a real estate agent, and subsequently received a payment of interest which the agent had received from the vendee, but she had not left the contract with him nor authorized him to collect; subsequently she sold to the agent her interest in the contract, and he sold said interest to the plaintiff, who paid the agent therefor, and at the agent's instance defendant made a deed to plaintiff, and subsequently, at the instance of the agent, gave a deed to the original vendee; such vendee had made full payment to the agent, but he had not paid the money over to defendant; two witnesses testified that defend-

ant acknowledged drawing the contract and deed to the original vendee, and that the agent had acted for her. *Held*, that there was no evidence to show that the real estate agent in receiving payment from the vendee after such agent had bought the contract from defendant received it as her agent, so that plaintiff could recover from defendant on the money counts as for money received to plaintiff's use. *Rhode v. Marquis*, 135 Mich. 48, 97 N. W. 53. Compare *Frank v. Levy*, 10 Ohio Cir. Ct. R. 554.

The owner of city lots employed two persons, associated together as real estate agents, to sell them, and fixed the price at \$14,000; a purchaser was secured by the agents at \$16,000, to whom a deed was executed direct by the owner, the agents accounting only for \$14,000, claiming that to be the full amount received, and being paid a commission thereon by the employer; on discovering that \$16,000 had been received from the purchaser, the owner first demanded a return of the check given for commissions, which was returned, and then sued the agents for the additional \$2,000 and recovered; the judgment being right on the merits, and the issues all having been found in favor of the plaintiff, and well supported by the evidence, it must be affirmed. *Collins v. McClurg*, 1 Colo. App. 348, 29 P. 299; *Babcock v. De Mott*, 160 Fed. 882; *Tate v. Aitken*, 5 Cal. App. 505, 90 P. 836; *Borst v. Lynch*, 133 Iowa, 567, 110 N. W. 1031; *Dater v. Jackson*, 76 Kan. 568, 92 P. 546; *Fulton v. Watters*, 28 Pa. Super. Ct. 269, reversed 216 Pa. St. 56; *Hall v. Kellogg*, 94 S. W. 389, 42 Tex. Civ. App. 636; *Lee v. Pattillo*, 105 Va. 10, 52 S. E. 696; *Easterly v. Mills* (Wash. Sup. '09), 103 P. 475.

Defendants, brokers, being authorized by plaintiffs to sell land for \$2,300, intrusted the matter to G, an employe, who persuaded one S to take the land for \$2,300, promising that defendants would raise the money for him; defendants failed to raise the money, whereupon S begged G to find some one to take the contract off his hands and save him the \$100 paid to plaintiff; defendants having then disposed of part of the land to the amount of \$600, H, an employe of defendants, with knowledge of the facts, agreed to take over the contract, S to take another part of the land for \$600, counting in his

\$100 paid; these two sales for \$600 each amounted to half of the land; plaintiff not knowing that H was an employe of defendants gave him a deed, and received from him \$2,300, less \$200 commissions paid defendants; H later sold the rest of the land for \$2,100. *Held*, that defendants and H were guilty of a legal fraud on plaintiff, and must, as trustees, account to him for the profits realized. *Powers v. Black*, 159 Pa. St. 153, 28 A. 133; *Mowbry v. Randolph*, 7 Cal. App. 421, 94 P. 403.

One who, knowing of an opportunity to sell for \$30 an acre, and then knowing the court would not allow a third of the purchase money as commissions, gets an ostensible purchaser, at a smaller price, as a means of passing title, is precluded from obtaining a commission by his fraud on the court of which the receiver was an officer. *Ryan v. Kahler* (Tex. Civ. App. '98), 46 S. W. 71.

M's agent agreed to pay plaintiff a commission for selling M's land, and defendant offered to exchange his land therefor and for \$210 in addition; plaintiff submitted the proposition to M's agent, who accepted it, and an agreement for exchange was executed by such agent in accordance with defendant's proposition and placed in plaintiff's hands to have defendant sign it; without disclosing the fact that the agreement for exchange had already been executed by M, plaintiff told defendant that a trade could be made, but defendant said he would pay no commission, but would trade even, if such a trade could be effected, and executed a written agreement to that effect; the exchange was duly made on the terms first proposed by defendant, and the \$210 paid over to him. *Held*, to show that plaintiff was acting as M's agent, and that he was not entitled to recover the \$210, or any other commission from defendant. *Wilson v. Webster*, 88 Iowa, 514, 55 N. W. 571; *Braden v. Randles*, 128 Iowa, 653, 105 N. W. 195.

Where it appears that a real estate agent employed to sell land had acted in similar transactions for the vendor, that after making the sale the agent was active in assisting the vendee's agent in clearing up some defects in the title; that he filled up a deed and carried it to the vendor to sign, and then took it away, without objection on the part of the ven-

dor, delivered it to the vendee's agent and received the purchase money, which he appropriated to his own use, and that the vendor subsequently admitted to disinterested persons that she had authorized the agent to collect the money, the loss thereof must fall on the vendor, under whose authority the agent acted. *Frank v. Levy*, 10 Ohio Cir. Ct. R. 554. Compare *Rhode v. Marquis*, 135 Mich. 48, 97 N. W. 53.

If a real estate agent authorized to sell land at a given price, three years after, when the value has greatly advanced and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing the principal of the rise in value, this will be such a fraud upon the principal that a court of equity will refuse to enforce a conveyance to the purchaser. *Proudfoot v. Wightman*, 78 Ill. 553. See *Wilkinson v. Churchill*, 114 Mass. 184.

Defendants signed and acknowledged a note and deed of trust, and left them with their agent, a professed real estate and loan broker, for the purpose of having him obtain the amount of the note from complainant, to whom the note was made payable; the agent presented the instrument to complainant, who paid over to him the amount of the note in good faith, and took the note and deed; the agent fraudulently reported that he could not use the note and trust deed, and in the presence of one of the defendants tore up and destroyed what purported to be said note and trust deed. *Held*, that defendants were not entitled to be relieved against the enforcement of the instrument. *Kallbom v. Lipp*, 20 Ill. App. 414.

Plaintiff authorized defendants to sell his land for a cash payment and notes, and on their representation that they had found a purchaser, and the cash payment and notes were ready to be delivered to him, executed and gave them a bond for title, blank as to the name of the purchaser; defendant failed to deliver the cash and notes on demand of plaintiff, and afterwards filled in the bond with the name of a purchaser. *Held*, that defendants' authority as plaintiff's agents to use the bond for title determined when they failed to deliver the cash and notes. *Patton v. Cook*, 83 Iowa, 71, 48 N. W. 994.

An agent employed to sell land, who becomes the purchaser

and conceals from the principal that a greater price might have been got from another, is guilty of fraud, and the contract ought to be vacated; he will be compelled to reconvey the land on payment of the purchase money, or so much as has been paid, and to account for the rents and profits received by him. *Moseley v. Buck*, 3 Munf. (Va.) 232; *Rodman v. Manning* (Or. Sup. '09), 99 P. 657, 1135.

Where one intrusts money to an agent to purchase land for him, it is a fraud for the agent to purchase the land in his own name and for his own benefit, and equity will interpose for the relief of the principal by compelling a conveyance to him of the land so purchased by the agent. *Rhea v. Puryear*, 26 Ark. 344; *White v. Ward*, 26 Ark. 445.

If an agent effects a sale of the land of his principal by false representations, or other fraud, without the authority or knowledge of the principal, the latter is chargeable with such fraud, in the same manner as if he had known or authorized it. *Law v. Grant*, 37 Wis. 548. Compare *Harrison v. Lake-man*, 189 Mo. 581, 88 S. W. 53. Where one takes a conveyance from an agent authorized to sell and convey the land, knowing of the fraud or breach of trust of the agent, he can not insist on the validity of the sale. *Morris v. Terrill*, 2 Rand. (Va.) 6. See also Sec. 845.

Defendant contracted with the owner of land for an option on it for a certain time, and at a certain price, and, if he effected a sale, he was to receive a commission therefor; also, for an extension of the time he should pay \$200 which, in case he should "buy the land or find a purchaser" therefor, was to be deducted from the price; defendant then contracted with plaintiff, a non-resident, to "procure the purchase for and conveyance to" plaintiff of the land in question at a much higher price, to act as plaintiff's agent in the management of the land, that all the proceeds of the sales should be applied to the reimbursement of plaintiff, with five per cent. interest and expenses; that the surplus should be equally divided between plaintiff and defendant; defendant appropriated the difference between the amount received from plaintiff and the sum paid to the vendor, concealing from plaintiff the difference in price. *Held*. that plaintiff could recover the amount so retained by

the fraud of the defendant. *Hewitt v. Young*, 82 Iowa, 224, 47 N. W. 1084; *DeL'Archerie v. Rutherford* (Wash. '09), 102 P. 1933.

An agent for the owner of real estate conducted a negotiation for the sale of the same on behalf of the owner, on the one hand, and was really, on the other hand, purchasing for himself, jointly with an ostensible purchaser, although the transaction purported to be entirely between the owner and such ostensible purchaser. *Held*, that the transaction was a constructive fraud upon the owner, and that a purchase thus made could not be sustained. *Hughes v. Washington*, 72 Ill. 84.

Where a real estate agent was acting under a contract with the owner of a lot, by which he was to receive a certain commission in the event he should sell the lot for not less than a certain sum, it was his duty before changing that contract for another more advantageous to himself, to impart to his principal all the information which he had, and especially to inform the principal of negotiations then pending for a sale of the lot, and his failure to do so was a fraud upon the principal's rights, and relieved the principal from all obligations to perform the new contract. *Edmonson v. Baker*, 12 Ky. L. R. (abst.) 93.

Defendant applied to a real estate agent for a mortgage loan; three unsatisfied mortgages were to be paid with the proceeds of the loan; plaintiff agreed with the agent to make the loan and gave the agent a check for the amount, taking a mortgage on the property, the agent assuring him that he would search the title and see that plaintiff had a first mortgage, but not informing him of the outstanding incumbrances; on execution of the mortgage defendant instructed the agent to pay off the three outstanding mortgages with a part of the money in his possession; the agent paid off one of the three mortgages only and appropriated the rest of the money. *Held*, that the payment of the amount of the loan to the agent was a payment to him as agent of defendant. *Henker v. Schwicker*, 73 N. Y. S. 656, 67 App. Div. 196; affirmed 174 N. Y. 298, 66 N. E. 971.

In a suit against a real estate broker, a lawyer, by a for-

mer customer or client, to vacate certain deeds procured by him to be executed by her in his interest, and for the cancellation of an alleged compromise agreement confirming such deeds, it was held that, on a review of the evidence, showing, among other things, that the defendant had purchased one interest from the complainant for \$1,175, worth \$2,000, and that shortly prior thereto, he had collected over \$800 for her, for which he failed to account, that whether, in view of the fiduciary relations of the defendant to the complainant, the burden was on him to show the validity of the transaction, the testimony, as a whole, was sufficient to justify a decree vacating the deeds and cancelling the agreement. *Holtzman v. Linton*, 27 App. D. C. 241.

Where a land-owner sued his brokers, who had effected a sale, to recover a portion of the purchase money which had been retained by them, on the ground that the contract was not binding on him, because he had been fraudulently induced to enter into it by the act of the defendants in not correctly reading the contract to him, and also on the ground that the contract had been nullified by the alteration thereof by defendants, an instruction that, if plaintiff signed the original contract, and defendants, in reading it to him had fraudulently deceived him, then the contract was not binding, was not erroneous, on the theory that the action was not one for the cancellation of a contract. *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53. Compare *Law v. Grant*, 37 Wis. 548.

Where a broker employed to sell at the highest obtainable price makes an arrangement with the prospective purchaser to pay him a commission, this fraud deprives him of the right to recover from the vendor. *Tasse v. Kindt*, 125 Wis. 631, 104 N. W. 703; *Raner's Law & Coll. Co. v. Bradbury*, 3 Cal. App. 256, 84 P. 1007.

If a broker employed to purchase property overstates to his principal the price at which it may be bought, and appropriates the difference, the principal may recover the excess wrongfully obtained. *Healey v. Martin*, 68 N. Y. S. 413, 33 Misc. 236; *Warren v. Burt*, 58 Fed. 101, 7 C. C. A. 105.

As a general rule, where one is employed by the owner of property to sell it, he can not sell it to himself alone, or in

company with others, without the consent of the owner; but in the present case there was evidence to show that the owner consented to the making of such a sale, provided that he should receive a certain amount, without liability on his part for commissions. *Mitchell v. Gifford* (Ga. Sup. '10), 67 S. E. 197 (Syllabus).

Sec. 315. Fraud of broker against third persons.

If in negotiating a contract in behalf of the principal the broker is guilty of fraud as to the other contracting party, he is liable to him therefor in damages. *Kice v. Porter*, 21 Ky. L. R. 871, 53 S. W. 285, 22 Ky. L. R. 1704, 61 S. W. 266; *Todd v. Bourke*, 27 La. Ann. 385; *Hardacre v. Stewart*, 5 Esp. (Eng.) 103; *Baker v. Brown*, 82 Cal. 64, 22 P. 879. If a broker employed to sell property which is subject to incumbrances misrepresents or conceals the fact that the property is incumbered, he is liable to the purchaser in damages. *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170; *Chisholm v. Gadsden*, 1 Strob. (S. C.) 220; *Arnot v. Biscoe*, 1 Ves. 95 (Eng.) 27 Eng. Rep. Reprint 914.

Where an agent for the sale of a mining property represented to a purchaser that he was to receive a certain commission on the sale from the owners, when in fact he was paid five times that amount, the price paid by the purchaser should be abated in the amount of the difference between the commission received and the one specified. *Henry v. Mayer*, 6 Ari. 103, 53 P. 590.

An agent having authority to sell both real and personal property for a certain sum can not, without the consent of his principal, take over to himself the personal property on receiving the sum for the real estate. *Northup v. Bathrick*, 80 Neb. 36, 113 N. W. 808. Where agents for the sale of land concealed from the purchasers the fact that they were part owners of the land, but instead, expressed an intention to purchase an interest themselves upon the same terms as they were selling to the purchasers, such representations constituted such a fraud as would avoid the purchase. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

Where land stood in the name of a third party, the real

owner procured a broker to sell the land who made false representations as to its value; the nominal owner of the land had title to a bond and mortgage given in part payment of the price. *Held*, that the fraud of the real owner and the broker was imputable to the person in whose name they acted. *Fairchild v. McMahon*, 139 N. Y. 290. 34 N. E. 779, affirming 20 N. Y. S. 31, 65 Hun, 621.

Where land was sold by a broker who made representations to induce defendant to purchase, which were known to the broker to be false, but were relied upon by defendant to his injury, plaintiff, availing himself of the benefits of the transaction, is bound by the representations, whether the broker was his appointed agent or not. *Williamson v. Tyson*, 105 Ala. 644, 17 S. 336.

Sec. 316. Fraud of sub-agent.

Plaintiff, who had contracted with a real estate agent to co-operate with him in selling to a third person certain property, with knowledge that such person was willing to purchase at a certain sum, induced the owner to sell for less, so that he could make the difference. *Held*, that he could not recover from the real estate agent his agreed proportion of the commission. *Talbott v. Luckett* (Md. Sup. '94), 30 A. 565.

A broker was employed to procure a purchaser for a farm within a specified time, at a price which should net the owner \$11,000 and the broker \$875, or such less sum as should be satisfactory to the broker's agent having charge of the transaction; the owner sold the premises to a purchaser procured by the agent of the broker for \$11,000, and the purchaser paid the agent \$100 for commissions. *Held*, that the owner, if he knew that the agent in conducting the sale violated the instructions of the broker, was liable to the broker for commissions to the extent of \$875, on the ground that he was guilty of fraud on the broker. *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21.

A vendor of land receiving the benefits of a transaction is liable for fraudulent representations by the salesman, though he was only a sub-agent. *Nelson v. Title & Trust Co.* 52 Wash. 258, 100 P. 730.

Sec. 317. Fraud of principal against broker.

Defendant employed plaintiff to sell his farm and some personal property, on an understanding that the plaintiff should receive a certain commission if he could procure a purchaser for \$18,000, otherwise nothing; plaintiff secured a purchaser who bid \$17,000 for the farm and defendant rejected the offer, and falsely represented to plaintiff that he had concluded to keep the property and settled with plaintiff for a nominal sum; defendant then approached the bidder and sold him the farm and some personal property for \$17,500, and sold the remainder of the personal property on the public market for \$720. *Held*, that the statement having been fraudulently made, defendant was liable for the agreed commission. *Bowe v. Gage*, 132 Wis. 441, 112 N. W. 469; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *McDermott v. Mahoney*, 139 Iowa, 292, 115 N. W. 32; *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055, 13 D. L. N. 853.

If a principal, in order to defraud the broker of his right to a commission, conveys the property to a third person for the benefit of the customer found by the broker, and the reason for the act being to conceal the same from the knowledge of the broker, the latter may sue for the commission; and it was error to dismiss the complaint because the proof sustained an action for fraud and did not prove the cause of action alleged. *Martin v. Fegan*, 88 N. Y. S. 472, 95 App. Div. 154; *Glade v. E. Ill. Min. Co.*, 129 Mo. App. 443, 107 S. W. 1002. See also Sec. 487a. A principal conspiring with a sub-agent to deprive the broker of his commission is liable to the latter therefor. *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21.

Sec. 318. Fraud of third persons against broker.

Where a vendee fraudulently conceals the fact that she purchased through a broker employed by the vendor, and represents that a third person was the procuring cause of the sale, whereby the vendor is induced to pay the commission to such third person, the broker can not sue the purchaser for the lost commission, as the vendor's liability to him remains unaffected by such payment to the third person. *Cohen v. Hirschfeld*, 16 Daly (N. Y.), 96, 9 N. Y. S. 512. A broker may be

deprived of his right to commissions by the fraudulent conduct or misrepresentations of third persons in privity with him. *Thwing v. Clifford*, 136 Mass. 482.

Sec. 319. Fraud of principals inter se.

Where two persons owning real estate intrust one with the sale thereof, who has it conveyed to a third person for a price agreed upon, the money being paid by the joint owner with a view to acquiring title to the property, such an arrangement is a fraud on the party owning the other moiety. *Eldridge v. Walker*, 60 Ill. 230; *Hughes v. Washington*, 72 Ill. 84.

Where land stood in the name of a third party, the real owner procured a broker to sell the land, who made false representations as to its value; the nominal owner of the land had title to a bond and mortgage given in part payment of the price. *Held*, that the fraud of the real owner and the broker was imputable to the person in whose name they acted. *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779. A real estate broker who produces one ready and willing to purchase, and an executory contract of sale has been entered into between the principal and the proposed purchaser, but able to do so only by perpetrating a fraud on a third person, the principal refusing to execute, is not entitled to a commission. *Zittle v. Schlesinger*, 46 Neb. 244, 65 N. W. 892; *Moskowitz v. Hornberger*, 46 N. Y. S. 462, 20 Misc. 558.

Sec. 320. Debatable acts of broker held not to constitute fraud.

A broker employed to find a buyer is not necessarily guilty of fraud because he seeks to induce his principal to reduce the price, even though he might know he could obtain the price asked. *Gorman v. Hargis*, 6 Okla. 360, 50 P. 92. Compare *Hobart v. Sherburne*, 66 Minn. 17, 68 N. W. 841. See also Secs. 290, 291.

It is not an act of disloyalty after obtaining an option on land at the lowest price for which the owner would sell and suspecting that his employer would not take at that price, for the broker with his employer's knowledge to solicit other purchasers whom he informed that his employer should have the first right to purchase. *Hinton v. Coleman*, 76 Wis. 221, 45

N. W. 26. A broker negotiated a sale of plaintiff's land to defendant, but had the deed made out to a third person, who afterwards conveyed to defendant. A few weeks after the sale defendant agreed to let the broker sell the land for him at an advance, the profits to be equally divided between them. Plaintiff did not know at the time of the sale that defendant was the purchaser and there was then no arrangement or understanding between defendant and the broker as to any resale of the property or division of the profits. *Held*, that there was nothing in the transaction in fraud of plaintiff, and the subsequent sale did not constitute a fraud on the vendor. *Lawrence v. Layton*, 145 Ill. 92, 34 N. E. 53.

A real estate broker is not liable to a customer for false representations respecting lands, where he states that his information is derived from his principal, and the facts respecting which the representations are made are not such as would be peculiarly within his knowledge. *Griffing v. Diller*, 21 N. Y. S. 407.

If a broker acts as a mere middleman his conduct in concealing from each principal his agreement with the other is not fraudulent. *Jarvis v. Schaefer*, 105 N. Y. 289, 11 N. E. 634.

An agent authorized by contract to sell real estate to any purchaser thereafter to be secured, is not guilty of fraud for failing to disclose the identity of the proposed purchaser, where it appears that the vendors neither asked nor made any attempt to ascertain who such purchaser was. *Bank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, affirmed on rehearing 66 Neb. 767, 99 N. W. 666.

Where a real estate agent with authority to sell his principal's land reports to another agent of the principal that he can not sell the land so as to net the principal a certain sum, and that he is making a sale for a greater sum, but that the excess will be retained by him as his commission, and no contract is shown that he shall receive any specified amount for his service, though the amount of the excess is not disclosed, the agent commits no fraud by not disclosing such amount. *Deming Inv. Co. v. Meyer* (Okla. Sup. '07), 91 P. 846; *Fulton v. Watters*, 216 Pa. 56, 64 A. 860. Compare Sec. 456.

In an action to recover a real estate broker's commissions, it appeared that the owners, in naming their price, had informed the broker that they were willing to sell for less, if necessary, and that a prospective purchaser who had obtained an option from the broker was, before the owners had reduced the price, negotiating to sell the land to a third person for less than the owners' upset price. *Held*, that the facts did not conclusively prove that the broker had acted in bad faith. *Harvey v. Lindsay*, 117 Mich. 267, 75 N. W. 627.

Proof that an owner employing a broker to procure a purchaser allowed the broker to take as his commission a part of the money paid by the purchaser procured by him, in reliance on the broker's representations that the purchaser was able to and would consummate his purchase according to the contract entered into between him and the owner, and that the purchaser was insolvent, was insufficient to authorize a recovery by the owner of the commissions paid, on the ground of fraud of the broker. *Moore v. Irvin*, 89 Ark. 289, 116 S. W. 662.

A real estate broker had a customer desirous of purchasing property of a particular character, but the customer had no definite intention of buying any particular property. The broker entered into negotiations with the owner to employ him to procure a purchaser. The customer purchased the property. Prior to the broker's employment the customer had not communicated with the owner, nor with any one representing him in relation to the purchase. The broker represented to the owner that he thought that he could produce a purchaser willing to purchase on the terms specified, on his being allowed a commission for so doing. *Held*, that the broker was not guilty of fraud in obtaining his contract to procure a purchaser, and he could recover his commissions. *Larson v. Thoma* (Iowa Sup. '09), 121 N. W. 1059.

A broker does not forfeit his right to commissions on a sale of real estate that he was instrumental in bringing about, because he had other real estate for sale, belonging to other persons, which he tried to sell to the same purchaser. *Lemmon v. Macklem* (Mich. Sup. '09), 122 N. W. 77.

Sec. 321. Points of practice in actions for fraud.

The vendee's right to rescind because the vendor gave a secret commission to the vendee's agent is not affected by the fact that a part of the commission paid by the vendor to the vendee's agent was for services previously rendered by such agent in former transactions. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189. See also Sec. 559.

Where the discovery of fraud in a contract for the purchase of land is not made by the vendee until after suit has been brought for the purchase money, the vendee has the right to set up the fraud as ground for rescission and as a defense to the suit, and he may do this where there is a delay of nearly two and a half months after the discovery of the fraud, if there has been no such change in the meantime as to make the rescission inequitable. *Id.* Compare Sec. 572.

Where a real estate broker fraudulently induces his principal to trade property on a valuation of \$4,400 and sells it for \$5,750, in an action by the principal against the broker for the difference, the latter could not recoup the amount of expenses incurred in making the sale, nor a portion of the price paid one who was associated with him in the fraud. *Van Raulte v. Epstein*, 202 Mo. 173, 99 S. W. 1077; *Great Western Gold Co. v. Chambers* (Cal. Sup. '09), 101 P. 6.

In an action to recover on a contract for commissions for a sale of real estate, in which defendant alleged that the contract was procured through fraud, and after plaintiff had negotiated the sale, the burden of proof was on defendant. *Stein v. Whitney*, 23 Ky. L. R. 2179, 66 S. W. 820. *Contra, Hanna v. Haynes*, 42 Wash. 284, 84 P. 861.

A broker employed to purchase land, who conceals from the principal the fact that the vendor will pay the broker a commission on making a sale, has the burden of proving perfect fairness in the transaction, and, in the absence of satisfactory proof, equity will consider him as guilty of constructive fraud. *Hanna v. Haynes*, 42 Wash. 284, 84 P. 861. Compare *Stein v. Whitney*, 23 Ky. L. R. 2179, 66 S. W. 820.

An innocent vendor can not be sued in tort for the fraud of his agent in effecting a sale; in such a case the vendee may rescind the contract and reclaim the money paid, and if not

repaid, may sue the vendor in assumpsit for it, or he may sue the agent for the deceit. *Kennedy v. McKay*, 43 N. J. L. 288. A recovery in an action by a principal against a broker for fraudulently representing that the worthless property on which the loan was made was good security, is not affected by the question whether he shared the money with or delivered any part of it to the pretended borrower. *Rubens v. Mead*, 121 Cal. 17, 53 P. 432; *Van Raulte v. Epstein*, 202 Mo. 173, 99 S. W. 1077, *supra*.

Although the owner of the land neither authorized another to sell it for him, nor has authorized the false representation made in the course of the sale, yet if such owner accepts the proceeds of the transaction, he ratifies the acts of his agent, and may be held liable for the fraud practiced by the latter. *Krunner v. Beach*, 25 Hun (N. Y.), 293. See Sec. 24.

The rule of law forbidding the admission of evidence of an oral agreement made prior to or contemporaneously with a written agreement, does not preclude the admission of evidence tending to show that the written agreement in question was fraudulently obtained, or that it resulted from accident or mutual mistake. *Culp v. Powell*, 68 Mo. App. 238.

It is immaterial whether the design is fraudulent or not, a sale by an agent of his own property to his principal can be set aside by the latter on discovery of the facts. *Bain v. Brown*, 56 N. Y. 285; *Kutz v. Fisher*, 8 Kan. 90; *Ackenburg v. McCool*, 36 Ind. 473. See also Sec. 389b.

Where the assignee of a purchaser of land from a broker sued the principal for breach of contract, defendant could not impeach the contract, on the ground that it was not signed by the principal, and for fraud, without pleading such defense. *Kurinsky v. Lynch*, 201 Mass. 28, 87 N. E. 70.

CHAPTER V.

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Sec. 322. When a broker is and when not liable for interest.

A real estate broker receiving money and not applying it to the purposes specified in the agreement under which he acted, within a reasonable time, is chargeable with interest. *Harrison v. Long*, 4 Desaus. (S. C.) 110. A broker is not liable for interest on money of his principal unless in default, or unless he has made use of the money for his own profit. *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353.

Where a broker was only entitled to commissions out of the last three of a series of notes to be given by the purchaser for the property, which were to be executed as of September 1, 1902, and were to mature on the first days of July, August and September, 1907, the broker, on the principal's failure to complete the contract, was only entitled to recover interest on the contract commissions from August 1, 1907. *Bankers' Loan & Inv. Co. v. Spindle*, 108 Va. 426, 62 S. E. 266.

Sec. 323. Broker obtaining interest hostile to principal.

Where a broker who procured a sale of bonds, secretly obtained an interest hostile to his principal, he was entitled to recover the commission paid to him. *Guidetti v. Tuoti*, 102 N. Y. S. 499, 52 Misc. 657; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90. See also Sec. 382.

Sec. 324. Improvement of property beyond authority of agent.

Unless specially authorized a real estate agent has no right to contract for the improvement of property. *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720. See reference under Sec. 307.

Sec. 325. Agent neglecting to place insurance, followed by loss, liable.

An agent whose duty it is to insure the property of his principal, and who neglects to do so, is liable to the latter for any loss of property occasioned by the peril that he should have insured against. *Strong v. High*, 2 Rob. (La.) 103. See also Secs. 346, 349.

Sec. 326. Illegal purposes.

An agent of the owner of property is not presumed to have any authority to lease the premises for an illegal purpose. *Stover v. Flower*, 120 Iowa, 514, 94 N. W. 1100

Sec. 327. Illegal contract.

Where the contract negotiated is illegal, the broker can not recover for his services, though his principal has received the money arising from it. *Belding v. Pitkin*, 2 Caines (N. Y.), 147.

Sec. 328. Implied powers.

(a) A non-resident owner employing a non-resident agent to sell, impliedly authorizes the latter to employ a broker to effect a sale. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574.

(b) If the contract of employment fails to state the terms of sale, terms satisfactory to the principal are implied. *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Montgomery v. Knickerbocker*, 50 N. Y. S. 128, 27 App. Div. 117.

(c) A contract of agency will not be construed to be exclusive unless established expressly or by clear implication. *Crook v. Forst*, 116 Ala. 395, 22 S. 540; *White v. Benton*, 121 Iowa, 354, 96 N. W. 876; *Kidman v. Howard*, 18 S. D. 161, 99 N. W. 1104.

(d) A revocation may be implied from circumstances. *Brookshire v. Brookshire*, 8 Ired. (N. C.) 74.

(e) Authority to sell and convey lands for cash includes authority in the agent to receive payment of the purchase money. *Yerby v. Grigsby*, 9 Leigh (Va.), 387.

(f) Authority to make a contract for the sale of lands, authorizes the agent to receive so much of the purchase money

as is paid in hand, on the sale, as an incident to the power of sale. *Id.*

(g) A broker authorized to sell, partly for cash and partly on time, may determine the amount of the cash payment. *Taylor v. Cox* (Tex. Sup. '87), 7 S. W. 69.

(h) The word "sell" in a power of attorney authorizing a party to sell or lease any and all real estate, etc., gives ample power to complete a sale by making a deed of conveyance. *Hemstreet v. Burdick*, 90 Ill. 444. Compare *Bacon v. Davis* (Cal. App. '08), 98 P. 71.

(i) A power of attorney to sell one-half of a tract of land imposes discretion to determine which half. *Aleman v. Daly*, 36 Cal. 90.

(j) A power to do all things concerning the grantor's real and personal estate, gives power to make leases, with privilege of purchase. *De Rutte v. Muldrew*, 16 Cal. 505.

(k) A power of attorney to sell, without restrictions, authorizes a sale of real estate, with covenants of general warranty. *Schultz v. Griffin*, 121 N. Y. 294, 24 N. E. 480; *Jasper v. Wilson* (N. M. Sup. '08), 94 P. 951. But see Sec. 418.

(l) Under a general power to sell property the agent may bind his principal by a contract of sale. *Haydock v. Stowe*, 40 N. Y. 363. Compare *Weatherhead v. Ettinger*, 78 O. S. 104.

(m) In the absence of an express agreement on the subject, an agent employed to sell land is entitled to commissions on making a sale. *Harrison v. Long*, 4 Desau. (S. D.) 110.

(n) Where defendant in employing a broker to sell land did not purport to bind himself individually, but to bind a corporation of which he was president, in an action on the contract, he can not be held individually liable for the commissions, but may be held for breach of an implied warranty of authority to the extent of the damages resulting from the misrepresentation. *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128.

(o) Express authority of a village to borrow money and issue bonds therefor, includes authority to employ a person to procure a purchaser for the bonds, whether he be a broker or not. *Armstrong v. Village of Ft. Edwards*, 159 N. Y. 315, 53 N. E. 1116.

(p) The cashier of a bank having implied authority as its executive officer to contract for the disposal of lands acquired by the bank in the collection of its credits, will bind the bank by his contract to pay commissions for the disposal of lands placed in the hands of a broker, but which, through mistake in identity, the bank does not own. *Arnold v. Nat. Bk. of Waupaca*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

Sec. 329. Joint owner condoning fraud liable for benefits received.

A joint owner of real estate who consents to a listing thereof by his co-owner with real estate agents for sale, receives part of the consideration, and does not repudiate the sale made by the agents, after discovery that they were guilty of fraud, is estopped to deny connection with the fraud, but will be held liable only to the extent of the benefit actually received. *Alger v. Anderson*, 78 Fed. 729.

Sec. 330. An agent to sell has no authority to grant a license to cut timber.

An agent has no authority to license one to cut timber by virtue of his authority to bargain and sell land. *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446. See references under Sec. 307.

Sec. 331. What a principal must do to escape liability to the broker for commissions.

A principal who obtains knowledge from his broker that an intending purchaser procured by the broker is the person of whom he had learned from another source as a possible purchaser, owes to the broker the duty of either terminating the agency or notifying him that he intends personally to conduct future negotiations, and on his failure to do so, the broker is entitled to commissions, although the sale is completed by the owner himself. *Carroll v. Pettit*, 22 N. Y. S. 250, 67 Hun, 418.

Sec. 332. A power of attorney confirming all sales and leases confers power to sell.

A power of attorney confirming all sales, leases and contracts of every description, confers a power to sell land. *Sullivan v. Davis*, 4 Cal. 291.

Sec. 333. Power to sell any of constituent's land authorizes the sale of that acquired afterwards.

A power to sell any of the constituent's real estate, authorizes the attorney to sell real estate which the constituent acquires after the execution of such power. *Fay v. Winchester*, 4 Metc. (Mass.) 513; *Burkey v. Judd*, 22 Minn. 287.

Sec. 334. Power to sell land not previously conveyed, authorizes sale of tract not conveyed.

Under a power to sell all the land of the principal which the latter has not previously conveyed, the attorney is authorized to sell land that his principal had sold but not conveyed. *Mitchell v. Maupin*, 3 T. B. Mon. (Ky.) 185.

Sec. 335. Power to sell land, gave authority to sell on credit, to receive payments, etc.

Where a power of attorney authorized an agent to sell "certain lands," or any part or parcel thereof, for such sum or price, or on such terms, as to him shall seem meet, and for me and in my name to make," etc., "deeds for the same, either with or without covenants of warranty," it was held that the agent had authority to receive payments, and a payment to him was a good payment to the principal; if circumstances rendered it favorable for the interest of his principal, he might include other valuable considerations besides money in the consideration, and might sell an undivided interest in the property. *Carson v. Smith*, 5 Minn. 78; *Babson v. Cox*, 32 App. D. C. 542. Compare Sec. 53.

Sec. 336. Power to sell land for settlement, not violated if shown to have been bought on speculation.

A power of attorney to sell certain lands "for the purpose of making actual settlement thereof, to sign, seal and deliver sufficient deeds," etc., leaves it to the judgment of the attorney to determine whether the purchasers buy for the purpose specified in the power, and if there is no evidence of fraud on the part of the purchaser or attorney, the conveyance under the power will be valid, although it should afterward appear that the land was purchased, not for the purpose of settlement but on speculation. *Spofford v. Hobbs*, 29 Me. 148.

Sec. 337. Power to sell land does not include power to lease or exchange it.

A power to sell land does not include power to lease or exchange it. *Trudo v. Anderson*, 10 Mich. 357; *Lampkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Reese v. Medlock*, 27 Texas, 120. See references under Sec. 307.

Sec. 337a. Authority of agent construed to authorize contracting to sell, but not to convey the real estate.

A having possession of certain property of B, under a power of attorney to sell the same and execute the proper instruments of transfer, afterward gave the charge of the same, with deeds and papers in his possession, to C. A thereupon wrote to C: "I wish you to manage (my property) as you would if it were your own, and if a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." Held, that C was thereby authorized to contract for the sale of the real estate, but not to convey it. *Lyon v. Pollock*, 99 U. S. 668.

Sec. 337b. Power to sell does not include power to give an option.

A written power to sell land does not include power to give an option, unless so expressed. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. R. 977. See references under Sec. 307.

Sec. 338. Agent buying principal's share of land warrants for less than, liable for full value.

Where an agent received land warrants to locate on shares and to sell the land, and bought up his principal's share of the land for less than its value, without informing him of the price for which a part of the land had been sold, it was held that he was accountable for the full value at the time he sold it. *Taylor v. Knox*, 1 Dana (Ky.) 391. See also Sec. 323.

Sec. 339. Authority to locate and survey land confers no power to sell.

An authority to locate and survey land confers no power to sell. *Moore v. Lockett*, 2 Bibb. (Ky.) 67. See references under Sec. 307.

Sec. 340. Authority to sell in lots, conferred none to sell otherwise.

Where an owner of land, a part of which was surveyed in lots, gave his agent a power of attorney to convey the same "in lots as surveyed by B," a conveyance by the agent to G of a portion of the land which had not been surveyed was held invalid as in excess of the authority under said power. *Rice v. Tavernier*, 8 Minn. 248. See also Sec. 307c, and reference under Sec. 307.

Sec. 341. Broker not liable for mutual mistake that he had authority to make a contract of sale.

A real estate broker who represents that he has authority to sell certain land is not liable to a customer for the consequences of their mutual mistake of law in thinking that such authority carried with it the right to make a contract of sale. *McReavy v. Eshelman*, 4 Wash. 757, 31 P. 35.

Sec. 342. Agent to sell land has no right to receive anything but money in payment for principal.

An agent for the sale of land has no right to accept anything but money for his principal. *Bevis v. Heflin*, 63 Ind. 129; *Mann v. Robinson*, 19 W. Va. 49. See reference under Sec. 307.

Sec. 343. Broker has no right to receive Mexican money for earnest money.

A real estate agent who is authorized to accept a certain sum as earnest money is not thereby given power to accept Mexican money. *Edwards v. Davidson* (Tex. Civ. App. '04), 79 S. W. 48. See references under Sec. 307.

Sec. 344. Broker given minimum price, all over to be his compensation for selling, need not tell principal what land sold for.

The owner of land agreed to pay a broker all that he might obtain for the land above a minimum price per acre as compensation, and a fixed sum in addition; the broker sold the

land, but refused to state for how much, or state that he had sold it at the minimum price. *Held*, that he was not deprived of his right to compensation. *Fulton v. Watters*, 216 Pa. 56, 64 A. 860.

Sec. 345. Agent knowing of defect in principal's title can not himself acquire title.

If an agent discovers a defect in the title of his principal to land he can not misuse it to acquire title for himself, and, if he does, will be held as a trustee of the title for his principal. *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Gardner v. Ogden*, 22 N. Y. 327; *McMahon v. McGrow*, 26 Wis. 614; *Rogers v. Lockett*, 28 Ark. 290. See also Sec. 294.

Sec. 346. Broker guilty of negligence to injury of principal, barred commissions.

Although the broker finds a purchaser who is willing to buy on the terms imposed by the principal, yet he is not entitled to a commission if the trade fails through his negligence, and by the insertion of a condition which the agent employing him had no authority to direct. *Fisher v. Dynes*, 62 Ind. 348. And this applies as well in the case of an exchange lost thereby to the principal. *Stuart v. Stumph*, 126 Ind. 580, 26 N. E. 553; *Harkness v. Briscoe*, 47 Mo. App. 196; *Smye v. Groesbeck* (Tex. Civ. App. '02), 73 S. W. 972. See also Secs. 325, 349.

Sec. 347. Owners liable for negligence to prospective tenants injured while examining building.

Where the owner of a building employs brokers to obtain tenants and authorizes the broker to conduct their customers into the building, he is liable for injuries sustained by a customer while examining the building in company with the brokers and due to their negligence. *Boyd v. U. S. Mtge., etc., Co.*, 88 N. Y. S. 289, 94 App. Div. 413.

Sec. 348. When brokerage contract signed without reading will not be set aside for fraud.

One who negligently signs a brokerage contract without reading it, relying on statements of the brokers as to its contents,

is not entitled to have it set aside for fraud, when the signer had no right to rely on their statements. *Kimmell v. Skelly*, 130 Cal. 555, 62 P. 1067. Compare Sec. 52.

Sec. 349. A broker whose principal suffers loss through his negligence is liable to him therefor.

A money lender to whom a sum of money is given to invest is bound to exercise reasonable skill and prudence; by his business he holds himself out as possessing competent skill to determine what reasonable care and prudence requires; if he fails to exercise these, and through his negligence loss occurs, he is liable to make it good. *McFarland v. McClees*, 5 A. 50, 1 Pa. Cases 504; *Stewart v. Muse*, 62 Ind. 385; *Whitney v. Martine*, 6 Abb. (N. Y.) N. C. 72; *Hindricks v. Brady* (S. D. Sup. '06), 108 N. W. 332, 121 N. W. 777; *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014; *Hindricks v. Brady* (S. D. Sup. '09), 121 N. W. 777. See also Secs. 325, 346, 260, 261, 271.

Sec. 350. Broker departing from his instructions liable for loss arising therefrom.

A broker who has instructions to buy for his principal mortgages, or other first-class discount paper, who violates them and invests the money on his own judgment, is responsible for the consequent loss to his principal, though Civil Code, Art. 2987, declares that brokers shall not be responsible "for events which arise in the affairs in which they are employed." *Soudieu v. Faures*, 12 La. Ann. 746. See also Sec. 229, 230.

Sec. 351. Brokers not liable for loss on forged note, where they acted in good faith and disclosed their principal.

Note brokers are not personally liable for a loss on a forged note sold by them, when they advised the vendee at the sale that they were acting as agents and disclosed their principal. *Bailey v. Galbreath*, 100 Tenn. 599, 47 S. W. 84. Compare Sec. 574.

Sec. 352. Broker taking a note, payable at his office, not thereby authorized to collect.

A broker who negotiates a loan and receives his commission from the borrower, taking a note payable at his office to the

lender, is not authorized to receive payments on such note. *Englert v. White*, 92 Iowa, 97, 60 N. W. 224. Compare Secs. 255, 257, 356.

Sec. 353. Where broker has note payable at his office the maker is warranted in paying him.

Where a note is payable at the office of a broker, it is the duty of the maker, in the absence of directions from the holder to the contrary, to tender payment there, and finding the note in the broker's possession, the maker has a right to assume that the broker has authority to receive payment thereof. *Fifth Con. Church of Wash. v. Bright*, 28 App. D. C. 229. See also Sec. 357.

Sec. 354. Agent to receive principal and interest not authorized to receive payment before due.

An agent merely to receive the interest and principal of a note is not authorized to take the payment of the principal prior to the same becoming due. *Williams v. Pelley*, 96 Ill. App. 346. See references under Sec. 307.

Sec. 355. Agent to collect the interest not authorized to collect the principal.

In a suit to cancel a deed of trust on the ground of payment to the lender's broker, the fact that the broker negotiated the loan and collected interest on the loan is insufficient to make the broker the agent to collect the principal, where the lender was in possession of the security. *Heffereman v. Boteler*, 87 Mo. App. 316. Compare Sec. 353, 357, also references under Sec. 307.

Sec. 356. Agent who transacted all the business of the principal held agent to collect payment of note.

Where an agent transacted all the business with reference to the collection of the principal and interest of debts secured by note and mortgage, and acted as the agent of the investor in the care and protection of the security and to deal with the security as the agent deemed best, with the full knowledge of the principal, payment of a note to such agent was payment

to the principal. *Pochin v. Knoebel*, 63 Neb. 768, 89 N. W. 264. Compare Sec. 255, 352.

Sec. 357. Debtor, before payment, should see that agent has the security.

If a debtor owing money on a written security, pays or settles with another as agent, it is his duty, at his peril, to see that the person thus paid or settled with is in possession of the security. *Corbett v. Weller*, 27 Wash. 242, 67 P. 567. See also Sec. 353.

Sec. 358. Unless broker proves he could have made a sale on revocation entitled to recover only nominal damages.

In an action for damages for revocation of authority to sell land, nothing more than nominal damages can be recovered where the agent fails to show that he could have made a sale on the principal's terms. *Milligan v. Owen*, 123 Iowa 285, 98 N. W. 792.

Sec. 359. Notice to agent to bind the principal must be given while acting for the principal.

Notice to an agent to bind the principal must be given to the agent while engaged in the business and negotiations of the principal, or when it would be a breach of trust in the agent not to communicate the knowledge to his principal. *Pepper v. George*, 51 Ala. 190; *Pringle v. Dunn*, 37 Wis. 449.

Sec. 360. Broker, on finding customer to buy, to be entitled to commissions must give principal notice.

Although the broker finds a customer before the principal sells the property, he is not entitled to a commission if he delays to notify the owner until after a sale is made by the latter. *Bears v. Hyland*, 65 Minn. 150, 67 N. W. 1148; *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927; *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775.

Sec. 361. Notice waived where principal instructs broker to send prospective buyers to him.

Where a real estate agent is instructed by the principal to send persons inquiring about the property to the latter, the

agent is not required to notify the principal of the fact that he has sent persons to him, in order to recover commissions on a sale to any of such persons. *Clifford v. Meyer*, 6 Ind. App. 633, 33 N. E. 127, 34 N. E. 23.

Sec. 362. Principal can not reject offer through broker, and then sell and escape liability for commissions.

Where a real estate agent employed to sell lands introduces the owner to a purchaser and negotiations are commenced through such introduction, the agent is entitled to his commissions though a sale is not effected at first, and the owner declares the transaction off, but afterward makes the sale himself, without the aid of the agent. *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419; *Day v. Porter*, 161 Ill. 235, 43 N. E. 1073; *Somers v. Wescott*, 66 N. J. L. 551, 49 A. 462.

Sec. 363. Agent authorized to make a written can not make an oral contract.

An agent must closely follow the instructions of his principal; therefore, an agent authorized to enter into a "written contract" for the sale of land, can not enter into a verbal agreement for its sale. *Berning v. Pierce*, 5 Watts & S. (Pa.) 548. See references under Sec. 307.

Sec. 363a. Broker not entitled to commissions on contract not in conformity with authorization.

Under a contract providing that a broker on securing a purchaser shall receive a commission "when the contract for the sale is signed," the broker is not entitled to the commission on securing a parol offer which is accepted by the principal, where no contract of sale is signed, and the person making the offer fails to complete the purchase. *Schlansky v. Hillman*, 111 N. Y. S. 696. See Sec. 556.

Sec. 364. Agent acting under oral authority can not bind principal by written covenants.

An agent acting under parol authority can not bind his principal by a written covenant under seal, signed with the name of such principal; such an instrument is not, in any sense, the deed of the principal, unless delivered by him. *Harshaw v. McKesson*, 65 N. C. 688. See references under Sec. 307.

CHAPTER VI.

SECTION.

- 365. Postponement by purchaser—Broker earns commissions.
- 366. Undisputed possession for years—Agent authorized.
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SECTION.

- 374a. Owner can not, by refusing to convey, avoid liability to broker for earned commissions.
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Sec. 365. Postponement by prospective purchaser, broker not defeated of commissions by sale through another.

Where a broker put his principal in communication with a prospective purchaser for his lot, and the prospective purchaser postponed the proposition for the time being, but afterward went to another real estate agent, who was known to have authority to sell the lot, and made the purchase from him at a slightly reduced price, it was held that the first agent having set on foot inquiries and negotiations that culminated in the sale was entitled to the commission therefor. *Cunliff v. Hausman*, 97 Mo. App. 467, 71 S. W. 368. Compare Sec. 370.

Sec. 366. Possession undisputed for years raises presumption of authority of agent to convey.

After many years undisputed possession of real or personal property under a conveyance executed by a person as agent, his authority will be presumed. *Stockbridge v. West Stockbridge*, 14 Mass. 257, 261.

Sec. 367. Words "placed in the hands of" do not give agent the right to the possession of the property.

The expression "placed in the hands of ——— to be sold" used in a contract by which one person agrees to sell land for another for a commission, does not confer on the agent a right to the possession of the real estate; it is a familiar form of expression used to indicate the appointment of an agent to sell property. *Reeder v. Butler*, 19 Pa. Super. Ct. 604.

Sec. 368. Agent buying for principal, paying purchase money and taking deed to himself, holds absolutely.

Where a man employs an agent by parol to buy an estate, and the agent accordingly buys it, and no part of the consideration is paid by the principal and there is no written agreement between the parties, the principal can not compel the agent to convey the estate to him. *Dorsey v. Clarke*, 4 Har. & J. (Md.) 551; *Pinnock v. Clough*, 16 Vt. 500. Compare Sec. 462.

Sec. 369. Principal accepting property in lieu of cash, liable to broker for commissions.

A broker is entitled to his commissions for effecting a sale where the principal without objecting accepts property in lieu of cash. *Clark v. Allen*, 125 Cal. 276, 57 P. 985; *Rabb v. Johnson*, 28 Ind. App. 665, 63 N. E. 580; *Grether v. McCormick*, 79 Mo. App. 325; *Kennerly v. Somerville*, 68 Mo. App. 222; *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245, 55 A. 305; *Showaker v. Kelly*, 21 Pa. Super. Ct. 390; *Thornton v. Moody* (Tex. Civ. App. 93), 24 S. W. 331. See also Secs. 275, 376.

Sec. 370. Principal should pay the broker who procured the purchaser.

Where real estate is placed for sale in the hands of two independent brokers under an arrangement with the owner

assented to by both of them that the commission shall be paid to the one selling the property, it is the duty of the owner to pay the commission to the one actually producing a purchaser and consummating a sale. *Daniels v. Columbia Heights Land Co.*, 9 App. Cas. (D. C.) 483. See *Winans v. Jacques*, 10 Daly (N. Y.) 487.

Sec. 371. Agreement between brokers to divide commissions bars recovery thereof.

Where defendant employed plaintiff as his agent to effect an exchange of defendant's property, plaintiff being given discretion as to the valuation to be placed on the property, and plaintiff and the agent of the owner with whom the exchange was made agreed to pool their commissions and divide the pool, the commissions being based on the valuation, plaintiff was not entitled to recover commissions. *Quinn v. Burton*, 195 Mass. 277, 81 N. E. 257; *Levy v. Spencer*, 18 Colo. 532, 23 P. 415; *Norman v. Roseman*, 59 Mo. App. 682; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Shepard v. Hill*, 6 Wash. 605, 34 P. 159; *Carder v. O'Neill*, 207 Mo. 632, 106 S. W. 10; *Plotner v. Chillian* (Okla. Sup. '08), 95 P. 775. If the principals have knowledge of the pool and do not object thereto, the broker is not barred recovery of commissions. *Kurinsky v. Lynch* (Mass. '09), 87 N. E. 70; *Dearing v. Sears*, 3 N. Y. S. 31. Compare *Alvard v. Cook*, 174 Mass. 120, 54 N. E. 499.

Sec. 372. Authority to an agent to make necessary repairs, does not extend to permanent improvements.

If one employed to manage property for its owner is empowered to make such repairs only as are necessary to preserve and protect the property from ordinary wear and tear, he can not charge the owner with the expense of permanent improvements, or of rebuilding after a fire. *Beckman v. Wilson*, 61 Cal. 335; *Planer v. Equitable L. A. Soc.* (N. J. Ch. '97), 37 A. 668. See references under Sec. 307.

Sec. 373. Broker can not, unless authorized, retain commissions from purchase money.

Where real estate was placed in the hands of brokers for sale, and they purchased it from the agent of the owner with

power to sell, such agent had no legal right to retain commissions out of the price received, in the absence of a specific agreement to that effect. *Knott v. Midkiff*, 114 La. 234, 38 S. 153. See also Sec. 285, and references under Sec. 307.

Sec. 374. Vendor by refusal to sell, liable to broker for commission, though to be paid by customer.

W. employed C. & R. to purchase a lot for him upon certain terms, stipulating that the compensation of the latter was to be deducted from the purchase money going to the vendor, and was in no event to be paid by W. *Held*, that W. would be liable to C. & R. for their proper fees in case of a violation of the contract by W. in refusing to take the property. *Cowander v. Waddingham*, 2 Mo. App. 551; *Bird v. Blackwell* (Mo. App. '09), 115 S. W. 487. See also Secs. 197, 454.

Sec. 374a. Owner can not, by refusing to convey, avoid liability to the broker for earned commissions.

An owner can not, by refusing to convey, avoid liability to the broker for services rendered in procuring a purchaser while the contract of employment was in force. *Johnson v. Huber* (Kan. Sup. '09), 103 P. 99.

Sec. 375. Principal refusing to sell, broker not entitled to commission, in the absence of an established custom.

It is the custom of land agents or brokers in Wisconsin to charge and receive three per cent. of the amount of the purchase money. K. verbally employed P., a land broker, to sell for him certain lands at a fixed price. P. found a person who was ready and willing to purchase on the proposed terms when K. refused to sell; P. then brought suit, declaring upon a contract or promise of K. to pay three per cent. of the purchase money agreeably to usage in such cases. But it was held that such rate of compensation and such implied contract depended upon the consummation of the sale. Usage in order to enter into and become a part of the law of contract or trade must be established so clearly and explicitly, and be so notorious that the party must be presumed to know it and to have contracted with reference to it. *Power v. Kane*, 5 Wis. 265. See *Cavender v. Waddingham*, 2 Mo. App. 551.

Sec. 376. Broker not deprived of commissions as to part of consideration paid by other property.

Where a broker produces an acceptable purchaser in the manner and under the agreement stated, he will not be deprived of his commissions because the principal part of the consideration for the land by the buyer is other real estate which he owned. *Driesbach v. Rollins*, 39 Kan. 268, 18 P. 187. See also Sec. 275, 369.

Sec. 377. Broker agreeing to take real estate for compensation, on refusal can recover in cash.

A broker who, after performance of his contract, agrees to take real estate as compensation, upon the principal's refusal to convey the realty, is entitled to recover the commission in cash. *Morey v. Harvey*, 18 Colo. 40; 31 P. 719. Compare *Bailey v. Gardner*, 6 Abb. N. C. (N. Y.) 147.

Sec. 378. Broker originally agreeing to take realty for compensation, on refusal, can not recover in money.

The plaintiff, who was a real estate broker, agreed before certain commissions were earned by him, to take payment of them in lots of land, and afterwards selected the lots he would take; a deed thereof was duly tendered and refused. *Held*, that he could not recover the commission in money, on the ground that the agreement to convey the land was void. *Bailey v. Gardner*, 6 Abb. N. C. (N. Y.) 147. Compare *Morey v. Harvey*, 18 Colo. 40, 31 P. 719.

Sec. 379. Release to owner by one broker left the other entitled to one-half of remaining land.

An owner employed a broker to procure a purchaser for a tract of land; the broker, with the owner's consent, employed a third person to assist in procuring a purchaser; the owner thereupon executed an agreement reciting that the broker and the third person were to receive any amount above \$17,000 for the whole tract; a purchaser agreed to take a part of the tract at \$20,000; the owner paid the broker his commissions, receiving a receipt in full. *Held*, that the third person was entitled to the half of the land remaining unsold, but not to any

part released to the owner by the broker by his receipt in full, and objection to the contract sued on, on the ground that it was within the statute of frauds, comes too late after judgment. *Ewart v. Young*, 119 Mo. App. 483, 96 S. W. 420. Amendment allowable in Appellate Court. *Bausch v. McConnell*, 13 Ohio Cir. Ct. 640.

Sec. 380. Release by vendor of vendee from his obligation does not deprive broker of right to commissions.

A broker has earned his commissions when he has presented a customer whom the owner accepts, and evidences such acceptance by entering into an enforceable, binding contract; the action of the vendor in releasing a vendee from his obligations, for reasons suiting his own convenience, can not affect the right of the broker to recover his commissions. *Packer v. Sheppard*, 127 Ill. App. 598; *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174.

CHAPTER VII.

SECTION.

- 381. Agent to collect rent not authorized to employ broker to sell land.
- 382. Broker required to refund commissions when he has acted in bad faith.
- 383. Receipt by broker, signed by himself as agent, binds him individually.
- 384. Where agent gives receipt in name of principal, purchaser must look to latter.
- 385. Receipt in name of principal—Purchaser may recall before money is paid to him.
- 386. Creditor authorized to collect rent can not pay therefrom his own debt.
- 387. Agent to collect rent must apply the same as directed by principal.
- 388. Broker acting in interest of others, not entitled to share in transaction for principal.

SECTION.

- 389. Broker purchasing property not entitled to commissions for its sale.
- 389a. Agent can not become buyer of principal's property.
- 389b. When employed to purchase, agent can not sell his own property to principal.
- 389c. Circumstances under which agent has right to purchase the property for himself.
- 390. Broker liable for fraud of sub-agent.
- 391. Sub-agent concealing fact deprives broker of right to commissions.
- 392. Sub-agent exceeding authority bars commissions.
- 392a. Broker selling on terms varying from instructions.
- 392b. Broker departing from instructions in making sales.
- 393. Principal not liable to broker's sub-agent.
- 394. Broker not liable for poor sale by sub-agent.

Sec. 381. Agent to collect rent not authorized to employ broker to sell land.

The issue was, whether one executing a contract on behalf of a landowner had authority so to do, and it was shown that he was authorized by one who was engaged in renting property and collecting rents for the landowner. *Held*, that the relations between the rent agent and the owner were not sufficient to

warrant an inference of authority to empower the person executing the contract. *Topliff v. Shadwell*, 64 Kan. 884, 67 P. 545; *Hunn v. Ashton*, 121 Iowa 265, 96 N. W. 745. See also Sec. 392 and reference under Sec. 307.

Sec. 382. Broker required to refund commissions when he has acted in bad faith.

Where, after confirmation of sale, the owner pays to the broker the commissions agreed on, and afterwards discovers that the title to the land he has received in exchange is defective, and the representations made as to the situation and value are false. *Held*, before he can recover from such broker the commissions so paid for the exchange, he must further show that the broker acted in bad faith, and concealed from him information possessed by said broker in regard to the title, situation and value of the land. *Lockwood v. Halsey*, 41 Kan. 166, 21 P. 98; *Volker v. Fisk* (N. J. Ch. '09), 72 A. 1011. See also Sec. 323.

Sec. 383. Receipt by broker, signed by himself as agent, binds him individually.

Where brokers, making a sale, give the vendee a receipt for the first payment, signed by themselves as agents, in which it is stated, "it is agreed that in case the title appears to be not good, this \$1,000 will be refunded by us," they are personally liable to the vendee, in case of failure of title, even though the contract of sale by the vendor contains a similar provision. *Mead v. Altgeld*, 136 Ill. 298, 26 N. E. 388; *Reed v. Riddle*, 48 N. J. Ch. 359, 7 A. 487. See also Secs. 76a, 168.

Sec. 384. Where agent gives receipt in name of principal, purchaser must look to latter.

Where an agent receipts for money in the name of his principal, the purchaser must look to the latter to account for it, and can not recover from the agent, whether the latter has delivered it to his principal or not. *McCubbin v. Graham*, 4 Kan. 340; *Bamford v. Shuttleworth*, 11 Ad. & El. (Eng.) 926; *Hancock v. Gomery*, 58 Barb. (N. Y.) 490; *Colvin v. Holbrook*, 2 N. Y. 126; *Costigan v. Newland*, 12 Barb. (N. Y.) 1456. See Secs. 385, 642b.

Sec. 385. Receipt in name of principal, purchaser may recall before money is paid to him.

If a party who has paid money to an agent for the use of his principal becomes entitled to recall it, he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal. *Bamford v. Shuttleworth*, 11 Ad. & El. (Eng.) 926; *Saddle v. Evans*, 4 Burr, 1984; 1 Pars. Con. 79; Story on Ag., Sec. 300. Compare Secs. 642b, 384.

Sec. 386. Creditor authorized to collect rent can not pay therefrom his own debt.

A. authorized B. to collect certain rents, and directed him to apply them, (1) to the payment of certain demands due to third persons, and then to the payment of a mortgage held by B. B. collected the rents, which did not amount to enough to pay the preferred demands, and appropriated them all to his own claim. In an action by A. for the money, *Held*, that B. could not set off his own demand. *Tagg v. Bowman*, 108 Pa. St. 273. See references under Sec. 307.

Sec. 387. Agent to collect rent must apply the same as directed by principal.

Where defendant, after he had been, by an instrument in writing, authorized by the owner of land to collect rents and make certain disposition thereof, accepted an order by such owner directing him to pay a specific portion of the accrued rents to the payee therein, this was a modification of the original agreement and binding upon defendant, though he might otherwise have been entitled to apply such rent to the satisfaction of claims held by him. *Gray v. Barge*, 50 N. W. 1014, 47 Minn. 498.

Sec. 388. Broker acting in the interest of others, not entitled to share in transaction negotiated for principal.

An agreement that a land agent shall have an interest in transactions negotiated by him, does not entitle him to share in a transaction in which he acted for other persons from whom he received compensation for effecting the sale. *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868. See also Secs. 290, 314.

Sec. 389. Broker purchasing property not entitled to commissions for its sale.

An agreement by a real estate agent to divide commissions on the sale of certain property if plaintiff should find a purchaser does not entitle plaintiff to a share of the commission, where he and a third person purchased the property. *Morganstern v. Hill*, 28 N. Y. S. 704, 8 Misc. 356; *Hess v. Gallagher*, 117 N. Y. S. 960. See also Sec. 290.

Sec. 389a. Agent can not become the buyer of the principal's property, even when sold at particular price.

An agent can not become the buyer of the principal's property, even when there is a sale at a particular price. *Ruckman v. Burgholz*, 37 N. J. L. 437; *Armstrong v. Elliott*, 29 Mich. 485. Compare Sec. 40. *Welling v. Poulsen* (Mich. Sup. '10), 125 N. W. 373.

Sec. 389b. When employed to purchase, agent can not sell his own property to principal.

When employed to purchase an agent can not sell his own property to his principal. *Deep River, etc., v. Fox*, 4 Ired. (N. C.) Eq. 61; *Banks v. Judah*, 8 Conn. 145; *Matthews v. Light*, 32 Me. 305; *Copeland v. M. Ins. Co.*, 6 Pick. (Mass.) 198; *Moore v. Mandlebaum*, 8 Mich. 433; *Moore v. Moore*, 5 N. Y. 256; *Sturdevant v. Pike*, 1 Ind. 277; *Segar v. Edwards*, 11 Leigh (Va.) 213; *Shannon v. Marmaduke*, 14 Tex. 217; *Cumberland, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553.

Sec. 389c. Circumstances under which agent had a right to purchase the property for himself.

Defendant was employed to effect a purchase of real estate at a price not to exceed \$51,000, and to take a contract therefor in his own name, to be assigned to plaintiff. *Held*, that after using all reasonable efforts to obtain said property for plaintiff at the limited sum, without success, he had a right to purchase the same for himself at the sum of \$52,000, the contract of employment fixing the law of the case, without regard to the fiduciary relations of the parties. *Pearsall v. Hirsch*, 14 N. Y. S. 305; *Clark v. Delario* (Mass. Sup. '10), 91 N. E. 299.

Sec. 390. Broker employing liable for fraud of sub-agent.

A broker is liable for the fraud of a sub-agent employed by him, and not in privity with the broker's principal. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364. See also Sec. 25.

Sec. 391. Sub-agent concealing fact from principal deprived broker of right to commission.

Where a sub-agent conceals from the principal the fact that he is acting for the agent, the latter can not recover a commission. *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790. See also Secs. 25, 291.

Sec. 392. Sub-agent exceeding authority can not bind the principal for commissions.

An agent to receive bids for property, who has no authority to consummate a sale, can not appoint a sub-agent so as to bind the principal for commissions on a sale made to a purchaser found by such sub-agent. *Jones v. Brand*, 106 Ky. 410, 20 Ky. L. R. 1997, 50 S. W. 679. See also Secs. 381, 395.

Sec. 392a. Broker selling on terms varying from instructions.

Where a broker was employed to sell property to certain persons on a payment down of \$17,500, he could not bind his principal by accepting a part payment of \$10 only, and hence was not entitled to the commissions. *Stoutenburg v. Evans* (Iowa Sup. '09), 120 N. W. 59. See references under Sec. 307.

Sec. 392b. Broker departing from instructions in making sale.

A broker employed to find a purchaser who would pay the purchase price, and in addition assume such assessments as might be levied against the property, did not comply with the terms given him so as to be entitled to the commission, where, in his agreement with the proposed purchaser, it was provided that the purchaser might assume the assessments, and if he did deduct them from the price. *Kane v. Dawson*, 52 Wash. 411, 100 P. 837. See references under Sec. 307.

Sec. 393. Principal not liable to compensate sub-agent employed by broker.

Ordinarily the principal is not liable to compensate a sub-agent employed by the broker to sell the property, although

authorized to take any steps necessary. *Carroll v. Tucker*, 21 N. Y. S. 952, 2 Misc. 397; *Mason v. Clifton*, 3 F. & F. (Eng.) 899; *J. B. Watkins Ld. Mtge. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72; *Benham v. Ferris* (Mich. Sup. '10), 124 N. W. 538; *Sterling v. De Laune* (Tex. Civ. App. '07), 105 S. W. 1169. See also Sec. 25. Unless he has ratified the appointment of the sub-agent. *Warren Com., etc., Co. v. R. E. Co.*, 120 Mo. App. 432, 96 S. W. 1038.

Sec. 394. Broker not liable for poor sale by sub-agent.

If an owner of land employs a broker to sell it, and the broker employs an agent in the place where the land is, and the broker honestly believes an offer made by the agent to be a good one, and so states to the owner, who accepts the offer in reliance on what is told him, the broker is not liable if the offer turns out to have been a poor one, he having used reasonable care in the matter. *Barnard v. Coffin*, 138 Mass. 37.

CHAPTER VIII.

SECTION.

- 395. Sub-agent violating instruction.
- 396. Sub-agent entitled to share of one-half commissions.
- 397. Agreement with sub-agent to divide fees binding on producing customer.
- 398. One employing agent liable for commissions.
- 399. Secretly learning price and sending buyer broker does not earn commission.
- 400. Secretly representing both parties bars commissions.
- 401. Vendor acts in bad faith by giving commissions to purchaser's agent.
- 402. Broker required to exercise the skill of calling.
- 403. Broker may be responsible for sufficiency of security.
- 404. Broker must account to principal for money received—Statute of frauds no protection.

SECTION.

- 405. Broker for seller, member of purchasing syndicate, bars commissions.
- 406. Broker giving names of syndicate before formed—Owner selling to others bars commissions.
- 407. Tenants in common jointly liable for commissions.
- 408. Broker selling lower than authorized bars commissions.
- 409. Terms of authorization can not be varied.
- 410. Half cash complied with by sale for all cash.
- 410a. Broker authorized to sell for half cash and remainder on time can not sell for all cash.
- 411. Contract modified, rights depend on new.
- 412. Failing to disclose best terms bars commissions.
- 412a. Broker understating price obtainable liable to principal for loss.

Sec. 395. Sub-agent violating instructions in obtaining offer in advance of bids.

One who has been employed by the agent to assist him in obtaining bids for property, was not acting under that authority when he advised others to make the principal an offer in advance of the bid obtained by the agent which was about to be accepted by the principal. *Jones v. Brand*, 106 Ky. 410, 20 Ky. L. R. 1997, 50 S. W. 679. See Secs. 381, 392.

Sec. 396. Sub-agent ordinarily entitled to share of one-half the commissions.

Where, in an action for a division of broker's commissions, defendant agreed to pay one-half of the commissions earned on the sale, and defendant admitted receiving \$287.50, it was proper for the court to assess plaintiff's damages at one-half of such sum. *McCleary v. Willis*, 36 Wash. 676, 77 P. 1073; *Bray v. Riggs*, 110 Mo. App. 630, 85 S. W. 116.

Sec. 397. Agreement with sub-agent to divide fees binding on producing purchaser.

Where plaintiff was authorized by the owner of land to sell it, and agreed to share the commission with defendant in case the latter found a purchaser, the contract was unilateral, binding on neither party until defendant found a purchaser. *Wefel v. Stillman*, 151 Ala. 249, 44 S. 203; *Casey v. Richards*, 101 P. 36 (Cal. App. '09). See also Sec. 20.

Sec. 398. One employing an agent to find a purchaser liable for commissions.

One who employed a broker to find a purchaser for real estate, and who did not disclose to the broker that he was acting as an agent, and did not disclose his principal until after the broker had found a purchaser, was liable to the broker for commissions. *Taubenblatt v. Galewski*, 108 N. Y. S. 588. See also Sec. 222.

Sec. 399. Secretly learning price of property and sending buyer, broker not entitled to commissions.

Where owners of real estate expressly refused to employ the plaintiff, a broker, in selling their property, it was held that the mere fact that the plaintiff, having ascertained the price charged for the property, sent a purchaser, to whom a sale was effected, did not entitle the plaintiff to recover commissions. *Pierce v. Thomas*, 4 E. D. Smith, 354. See also Sec. 443.

Sec. 400. Secretly representing both parties defeats broker's right to commissions.

A real estate agent who secretly undertakes to represent both parties, is not permitted to recover commissions from

either. *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S. E. 372; *Hess v. Gallagher*, 117 N. Y. S., 960. See also Sec. 314.

Sec. 401. Giving commissions to purchaser's agent vendor acts in bad faith, but contract not void.

The act of the vendor in giving secret commissions to the vendee's agent, although contrary to good faith and the policy of the law, does not make the contract of sale absolutely void. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189. Compare *Grant v. Gold Ex. Syn.*, 12 B. (Eng.) 233, 69 L. J. 2 B. 150. See also Sec. 40.

Sec. 402. Broker required to exercise such skill as is employed by persons in his calling.

A broker is required to use such skill as is ordinarily possessed and employed by persons of common capacity engaged in the same trade or business, and such diligence as persons of common prudence are accustomed to use about their own business affairs. *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568; *Shepherd v. Field*, 70 Ill. 438; *McFarland v. McClus*, 1 Pa. Cases, 504, 5 Atl. 50; Mechem on Ag., Sec. 494.

Sec. 403. Broker may be responsible for the sufficiency of the security.

Where a vendor relies on his broker in the sale of property, he must exercise reasonable care in passing on the sufficiency of the security taken for the price, if he has accepted that responsibility. *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014.

Sec. 404. Broker must account to principal for money received and withheld, and statute of frauds no protection.

Although an appointment in writing is necessary to constitute one an agent for the sale of real estate, one who sells real estate as the owner's agent would not be justified in retaining the difference between the amount that he represented to his principal he received for the property, and the amount he actually received, because his appointment was not in writing. *Merriman v. Thompson*, 48 Wash. 500, 93 P. 1075. See also Sec. 456.

Sec. 405. Broker for seller, member of purchasing syndicate, bars commissions.

The fact that, unknown to the principal, a member of a firm employed to sell land belongs to the syndicate to which the land was sold, bars the first from recovering commissions for the sale, though the price received by the principal was fair and all that he demanded. *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872. See also Sec. 559.

Sec. 406. Broker giving names of syndicate to owners, and before formed latter sells to others, broker barred commissions.

In an action by a real estate broker to recover commissions it appeared that he furnished the names of the members of a purchasing syndicate to the owner, but the syndicate was not fully formed, and all the purchasers were not then known, and it did not appear what proportion of the price each was to pay, and the owner sold to others before the syndicate was fully formed. *Held*, that the broker could not recover commissions, as he did not produce a person ready and willing to purchase. *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601.

Sec. 407. Tenants in common jointly liable for broker's commissions.

Where land is owned by two tenants in common, and is placed in the hands of one, who sells it through a broker, the owners are jointly liable for the broker's commissions. *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23; *Schomberg v. Auxier*, 101 Ky. 292, 19 Ky. L. R. 548, 40 S. W. 911.

Sec. 408. Broker effecting sale on lower terms than authorized, loses commissions.

A broker must follow the instructions of his employer; therefore, one who is promised compensation if he will procure a purchaser for property on certain terms can not claim compensation for effecting a sale on lower terms, he having, moreover, acted in part in the buyer's interest. *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227; *McDonald v. Cabiness*, 100 Tex. 615, 98 S. W. 943, 102 S. W. 720; *Varn v. Pelott*, 55 Fla. 357, 45 S. 1015.

Sec. 409. Terms of authorization can not be varied by the broker.

A letter authorizing agents to sell land for \$2,200, provided that the party could pay \$700 down, and the balance in one, two and three years, does not authorize them to sell for \$1,000 down and the balance in one and two years. *Speer v. Craig*, 16 Colo. 478, 27 P. 891; *Bunks v. Pierce*, 33 Colo. 440, 80 P. 1036; *Rake v. Townsend* (Iowa Sup. '05), 102 N. W. 499; *Crosthwaite v. Lebus*, 146 Ala. 525, 41 S. 853; *Engle v. Johnson*, 34 Ind. App. 593, 73 N. E. 772. See also Sec. 213.

Sec. 410. Terms of half cash complied with by sale for all cash on delivery of deed.

Where a contract authorizes an agent to sell land for "\$15,000, about one-half cash," but is silent as to a sale for any larger sum, or as to receiving more than one-half cash, or as to the form in which that part of the price which is not cash should be put, a sale for \$15,000 cash on delivery of the deed is in accordance with the contract. *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215. Compare Sec. 410a.

Sec. 410a. Broker authorized to sell for half cash and remainder on time can not sell for all cash.

A broker employed to sell land for one-half cash and balance on credit, can not recover a commission on the owner refusing to consummate a sale for all cash, unless the credit required to be extended was so short as to make it in effect a cash payment. *Taylor v. Read* (Tex. Civ. App. '08), 113 S. W. 191. Compare Sec. 410. See references under Sec. 307.

Sec. 411. Where the contract of employment is modified, broker's rights depend upon the new.

The terms of a contract of employment may be modified by a subsequent agreement, express or implied, the same as any other contract, in which case the broker's right to compensation depends upon the modified terms. *Cornell v. Hanna* (Kan. App. '98), 53 P. 790; *Deford v. Shepard*, 6 Kan. App. 428, 49 P. 795; *May v. Schuyler*, 43 N. Y. Super. Ct. 95.

Sec. 412. Broker failing to disclose to the principal the best terms loses right to commissions.

A broker employed to buy or sell property is not entitled to compensation where he fails to act in good faith and disclose to his principal the best terms upon which the transaction can be consummated. *Henderson v. Vincent*, 84 Ala. 99, 4 S. 180; *Morey v. Laird*, 108 Iowa, 670, 77 N. W. 835; *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479; *Martin v. Bliss*, 10 N. Y. S. 886, 57 Hun, 157; *Ballinger v. Wilson* (N. J. Ch. '02), 53 A. 488. See also Sec. 412a.

Section 412a. Broker understating price obtainable liable to principal for loss.

If the broker employed to sell or exchange property understates to the principal the best price or arrangement obtainable, the principal is entitled to recover from him the difference between that obtained and that which might have been obtained. *Holmes v. Cathcart*, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734. See also Secs. 290, 412.

CHAPTER IX.

SECTION.

- 413. Unless clothed with power by owner no one can transfer title to another's land.
- 414. Fraudulent acts of broker may give rise to an action of tort.
- 414a. Proceedings to enforce one remedy barred any other.
- 415. Unauthorized negotiations of broker not ratified by sale by owner to customer.
- 416. Broker accepting valuation made by buyer—Principal bound thereby.
- 416a. Owner bound by legitimate effect of his language rather than his own understanding of its import.
- 417. In some States power to sell and convey land includes power to give covenants of warranty.

SECTION.*

- 418. In others power to warrant specially conferred.
- 419. Contract for sale of real estate may be sold without authority conferred in writing.
- 420. When duty of principal to collect purchase money notes.
- 420a. Duty to collect purchase price devolves on seller.
- 421. Presumption after revocation that broker acts for purchaser.
- 421a. One receiving inquiry from broker as to price of land may infer he is acting for another.
- 422. Authority to sell for fixed sum binding.
- 422a. Authority to sell for specified sum is for cash only.

Sec. 413. Unless clothed with power by owner no one can transfer title to another's land.

No one can transfer title to another's property, unless the owner has clothed him with authority, real or apparent, to do so. *McGoldrick v. Willits*, 52 N. Y. 612.

Sec. 414. Fraudulent acts of broker may give rise to an action of tort.

If a broker employed to sell property understates to his principal the price received by him and appropriates the difference must account to him therefor. *Collins v. McClurg*, 1 Colo.

App. 348, 29 P. 299; *Helberg v. Nickol*, 149 Ill. App. 249, 37 N. E. 63; *Cornwall v. Foord*, 96 Ill. App. 366; *Bassett v. Rogers*, 165 Mass. 377, 43 N. E. 180; *Stearns v. Hockbrunn*, 24 Wash. 206, 64 P. 165; *Love v. Hass*, 62 Ind. 255; *Henshaw v. Wilson*, 46 Ill. App. 364. And in addition, his fraudulent conduct may subject him to an action for a breach of the contract. *Barnard v. Coffin*, 141 Mass. 27, 6 N. E. 364. Or to an action of tort. *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126. See also Deceit, Sec. 298.

Sec. 414a. Proceeding to enforce one remedy barred any other.

In an action by some of the members of a syndicate which own an equitable interest in property, the legal title to which is held by another in trust for all the members, for the amount received by the holder of the legal title from a broker employed by him to procure a purchaser of the property, as a part of the commission to be retained by the broker, on the ground of a fraudulent agreement between the holder of the legal title and the broker for a division of the commissions, bars an action against the broker for a rescission of the contract of employment and a reclamation of the commission retained by the broker. *Hechscher v. Blinton* (Va. Sup. '10), 66 S. E. 859.

Sec. 415. Unauthorized negotiations of brokers not ratified by the sale by owner to customer.

Defendants employed plaintiff to procure a purchaser for a ranch, and subsequently revoked the agency, and in the course of subsequent correspondence continually insisted that the ranch was not for sale, and that if defendants should sell the ranch they would not recognize any claim for commissions which plaintiff might make. *Held*, that the subsequent sale of the land by defendants to a purchaser with whom plaintiff had negotiated, was not a ratification of that unauthorized act so as to entitle plaintiff to commissions. *Loving Co. v. Hesperian Cattle Co.*, 176 Mo. 330, 75 S. W. 1095.

Sec. 416. Broker accepting valuation made by buyer, principal bound thereby.

Where an agent negotiating a sale of the interest in an estate accepts the valuation of the property made by the intend-

ing purchaser, and fails to examine the county records, or take other steps to inform himself of the real value, as advised to do, he will be held to have acted on his own judgment, and no relief will be granted to his principal if it turns out that the lands are more valuable than they were represented to be. *Herron v. Herron*, 32 N. W. 407, 71 Iowa, 428. See also, Sec. 25.

Sec. 416a. Owner bound by legitimate effect of his language rather than his own understanding of its import.

Where the language used by the owner, in conference with the broker, and the attending circumstances, were such as to justify the broker in believing that an extension of time in which to make the sale was given, and he acted on such belief, the owner is bound by the legitimate effect of his language and acts, rather than by his own understanding of their import. *Hancock v. Stacey* (Tex. Sup. '10), 125 S. W. 884.

Sec. 417. In some States power to sell and convey land includes power to give covenants of warranty.

In some jurisdictions the power to sell and convey land includes authority to convey it with covenants of general warranty. *Taggart v. Stanberry*, 2 McLain (U. S.), 543; *Peters v. Farnsworth*, 15 Vt. 155; *Venada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 293; *Le Roy v. Beard*, 8 How. (U. S.) 451. See next section. See Sec. 43.

Sec. 418. In some jurisdictions the power to sell with covenants of warranty must be specially conferred.

A broker employed to sell real property has ordinarily no power to effect a sale with warranty, and if he does it is such a departure from his authority that the contract will not bind the principal. *Yazel v. Palmer*, 88 Ill. 597; *Tudro v. Cushman*, 2 Wis. 279; *Nixon v. Hyserott*, 5 Johns. Ch. (N. Y.) 58; *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60; *Malone v. McCullough*, 15 Colo. 460, 24 P. 1040; *Stengel v. Sargeant* (N. J. Eq. '08), 68 A. 1106. See preceding Section. Compare Sec. 328k.

Sec. 419. Broker may sell a contract for the sale of real estate without written authority.

Penal Code, Sec. 640d, requiring written authority to authorize a broker to sell real estate for clients, does not apply to the employment of brokers to sell a contract for the sale of real estate at a higher price than that which the vendees had agreed to pay. *Levy v. Trimble*, 94 N. Y. S. 3, 47 Misc. 394.

Sec. 420. It is the duty of the principal to collect purchase money notes on which commissions depend.

Brokers procured purchasers for a mine, who offered one-half cash and their unsecured notes for the balance; these terms were unsatisfactory to the owner, but he agreed with the brokers to sell on these terms if they would wait for one-half of their commissions until the purchase money notes were collected. *Held*, that the owner owed the brokers the duty to make reasonable efforts to collect the notes as they matured, but the mere failure to bring suit on the notes was not a lack of diligence, in the absence of showing they were insolvent so that the notes could not be collected by suit. *Glade v. Ford*, 131 Mo. App. 164, 111 S. W. 135.

Sec. 420a. Duty to collect purchase price devolves on seller.

Though a broker's contract of employment provided that he should not receive commissions unless the deal was closed, and that the commissions were payable from the proceeds of the sale, the broker, in the absence of a contract to that effect, was not required to see that the purchase price was paid before he could receive commissions, as the duty to collect the price devolved on the seller, and not on the broker. *Pinkerton v. Hudson* (Ark. Sup. '08), 113 S. W. 35.

Sec. 421. Presumption by continuing negotiations after revocation that agent acts for purchaser.

Where a broker is notified by a vendor that he will pay no commissions, and thereafter continues the negotiations for a sale, it is presumed that he is the agent of the purchaser and looks to him for his commissions. *Wolverton v. Tuttle*, 51 Ore. 501. 94 P. 961.

Sec. 421a. One receiving an inquiry from a broker as to the price of land may infer he is acting as agent for another.

Where defendant knew that plaintiff was a real estate broker, he could infer, upon receiving an inquiry from plaintiff as to the price of property, that the latter was acting as agent for another in seeking to purchase. *Rodman v. Manning* (Or. Sup. '09), 99 P. 657, 1135.

Sec. 422. Authority to sell for specific sum, did not authorize part cash and mortgage.

A broker's authority to sell land for a specific sum, did not authorize an agreement to sell for a part of the price in cash, the balance to be represented by a mortgage on the premises. *Stengel v. Sergeant* (N. J. Ch. '08), 68 A. 1106. See also Sec. 141.

Sec. 422a. Authority to sell for specified sum is for cash only.

A broker authorized to sell real estate for a specified sum, for a commission in excess of that sum, has authority to make a cash sale only. *Slayback v. Wetzel* (Mo. App. '09), 123 S. W. 982.

PART IV.
COMMISSIONS AND COMPENSATION
OF AGENTS.

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Sec. 423. Broker entitled to commissions on quantity contracted for, although less owned.

Where the terms of sale are fixed by the vendor, in accordance with which the broker introduced a proposed purchaser, and upon the procurement of the purchaser the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker,

so that a sale is made, or terms or conditions are offered which the proposed buyer is ready and willing to accept, the broker will be entitled to his commissions at the rate specified in his agreement with his principal. *Stewart v. Mather*, 32 Wis. 344. *Contra, Hoefling v. Hambleton*, 84 Tex. 517, 19 S. W. 689.

Sec. 423a. Broker entitled to agreed commissions and not limited to computation on lesser sale price.

A promise to pay a broker for selling land a commission "on the price I may accept if sold through your agency," means a commission on the price agreed to be paid for the property, and not only on the amount actually paid. *Condict v. Cowdrey*, 5 N. Y. S. 187, 23 N. Y. St. 600, 57 N. Y. Super. Ct. 66.

Sec. 424. Broker interfering in another's transaction not entitled to commissions.

A broker on being offered a commission to find a purchaser for certain lands, presented the matter to one who took it under advisement for a time, and then, wishing to signify his acceptance, sought the broker at his office, but not finding him, and learning that the owner was at the office of a rival broker went there, where the purchase was completed. *Held*, that the former was entitled to the commission. *Jenks v. Nobles*, 42 Ill. App. 33. See also Sec. 444.

Sec. 425. Broker agreeing to look to the purchaser for commissions bound by his election.

Plaintiff, a real estate broker, was employed by defendant to sell or exchange for him a farm and four lots, the farm at \$5,000, or the whole at \$13,000, and agreed to pay plaintiff commissions therefor at the rate of two and one-half per cent.; a purchaser was introduced to defendant by plaintiff, and an exchange finally agreed on, at the valuation of \$13,000; but the defendant insisted that the purchaser should pay the plaintiff's commissions, and the purchaser called on plaintiff and told him that it had been agreed between defendant and himself that he (the purchaser) was to pay plaintiff's commissions, and that the exchange had been made at a valuation of \$5,000, whereupon plaintiff agreed to look to the purchaser

for his commissions, and wrote a letter to defendant to that effect, whereupon the exchange was made. *Held*, that if the defendant acted on plaintiff's letter, and was guilty of no fraud, it would be immaterial what the purchaser said to plaintiff, as, if the purchaser had deceived plaintiff, defendant was not responsible therefor. *McClave v. Maynard*, 35 How. Pr. (N. Y.) 313. See also Sec. 588.

Sec. 425a. Broker employed to purchase not entitled to commissions from seller.

Plaintiff, a real estate broker, being employed by B., a person desirous of purchasing a residence, to find for him such a place as he desired, introduced him to defendant, who had a place to sell, and informed defendant that if B. purchased the property defendant would have to pay plaintiff the usual commission. Defendant had negotiations with B. in regard to a sale of the property, but failed to come to any agreement as to terms, and defendant then sold the property to his brother, who, eleven days thereafter, sold it to B. *Held*, that in the absence of any evidence to show that the sale by defendant to his brother, and the subsequent conveyance by him to B., was done to defraud plaintiff of his commissions, he could not recover them from defendant. It seems that plaintiff, having been employed by B., any agreement made by plaintiff with defendant for commissions was void as a fraud upon B., in the absence of proof that B. was apprised of such agreement, and assented thereto. *Bennett v. Kidder*, 5 Daly (N. Y.) 512.

Sec. 426. Broker not entitled to commissions on contract at set price and sale at less.

A broker hired to sell property at a certain price can not recover commissions for effecting a sale at a lower price, and the appellate court held that the case was properly taken from the jury. *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227; *Brown v. Adams* (R. I. Sup. '08), 69 A. 601.

Sec. 427. Broker not entitled to commissions, as contract secured was not a lease.

Plaintiffs, real estate brokers, were employed by defendant to procure a lease of certain real estate owned by her; they

negotiated an agreement for a lease, the terms of which she could not perform, nor could she enforce it against the other parties; and procured her to execute the same upon the assurance that it was effectual. *Held*, that an action was not maintainable to recover commissions, that to earn the same they were required to procure a lease or a valid agreement for one. *Crombie v. Waldo*, 137 N. Y. 129, 32 N. E. 1042, 33 N. E. 744; *Montgomery v. Knickerbocker*, 50 N. Y. S. 128, 27 App. Div. 117; *Ward v. Zborowski*, 63 N. Y. S. 219, 31 Misc. 66; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67, rehearing denied 172 N. Y. 646; *Laws & Bradford v. Schmidt*, 80 O. S. 108, 88 N. E. 319. See also Sec. 812, and references under Sec. 307.

The owner of real estate agreed with brokers that if they would make a lease of the property, in accordance with her proposition, she would pay the commission stipulated. The proposition was to lease perpetually, lessees to have the privilege of purchase at the end of twenty years, and required the lessees to erect a modern, first-class building, to secure the erection of which they were to deposit \$20,000, and, in the event of failure the fund so deposited to go to the owner, but if the building should be completed, then to the lessees, and it was provided that the proposition should be binding on the payment of \$1,000, to be credited on the first quarterly payment of rent. *Held*, that the mere procurement by the brokers of a party who accepted the owner's proposition, but neither did, nor offered to do anything further, the owner not having herself defaulted in any respect, did not entitle the brokers to the commission. *Laws v. Schmidt*, 80 Ohio St. 108, 88 N. E. 319; *Bradford v. Schmidt*, 80 Ohio St. 108, 88 N. E. 319.

Sec. 423. Immaterial variance in description did not deprive broker of commissions.

Where plaintiff made a contract by which he was to have the exclusive right for twenty days to effect a sale of defendant's farm, and the contract of purchase which he secured described the land as containing so many acres on which defendant resided, lying partly in one and partly in another town

named, and bounded but on three sides, and concluded by stating that it was formerly known as the "Van Allen farm;" whereas it is designated as the "Owen's place," in defendant's contract, the variance is immaterial, as the description is sufficient to enable the land to be located, and it is not void for uncertainty, and the broker is entitled to commissions. *Schultz v. Griffin*, 8 N. Y. S. R. 332, reversed 121 N. Y. 294, 24 N. E. 480. See also Secs. 59, 428a.

Sec. 428a. Wrong description insufficient to defeat broker's right to commissions.

An owner of land listed it with a real estate broker to be sold within a given time, at a stated price, agreeing to pay the broker ten per cent. if he sold it, and five per cent. if the owner sold it, which he did within the specified time. It appeared that the number of the lot was by mutual mistake erroneously stated in the contract, but the land was otherwise clearly described. *Held*, that the mere mistake as to the number of the lot was insufficient to defeat a recovery by plaintiff. *Tyler v. Justice*, 120 Ga. 879, 48 S. E. 328. See also Secs. 59, 428.

Sec. 428b. What circumstances fell short of a variance.

Where, in an action by a broker for commissions, the complaint alleged that he was employed to procure a purchaser of real estate for a commission, on condition that plaintiff would at once advise the purchaser to give the seller a contract for the construction of a building on the premises, but that, unless the seller got such contract the plaintiff should receive nothing, and that the purchaser awarded to the owner such a contract, and the broker testified that the owner informed him that, if he induced the purchaser to award to the owner a contract to erect a building, a specified sum would be paid as commissions, otherwise no commission would be paid, the subsequent testimony of the broker that nothing was said as to his advising the purchaser to build, did not create a variance between the pleading and the proof, but, at most, only varied the terms of the contract relating to the same transaction, and the owner was not misled thereby. *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267.

Sec. 429. Broker securing loan for a less amount, which is accepted, entitled to commissions.

In an action upon an agreement to pay a broker a commission for obtaining a loan, it appeared that a loan for a less amount was obtained, and at first accepted, but subsequently declined by the principal as being insufficient for his purpose. *Held*, that the service had been rendered and the commission was due, in the absence of any usage among New York brokers to receive no compensation unless the matter was consummated. *Van Lieu v. Byrnes*, 1 Hilton (N. Y.), 133.

Sec. 430. Broker to procure a loan entitled to commissions on finding a lender.

A broker employed to effect a loan is entitled to his commissions when he has found a lender who has the money and who approves of the security, unless his rights are varied by special contract; there is always an implied condition that the borrower will show a good title. *Phister v. Gove*, 48 Mo. App. 455; *Calvin Philip & Co. v. Laylow* (Wash. Sup. '09), 104 P. 610; *Rockwell v. Hurst*, 13 N. Y. S. 290; *Budd v. Zoller*, 52 Mo. 238; *Steele v. Lippman*, 115 N. Y. S. 1099; *Steele v. Rumore*, 117 N. Y. S. 189.

Sec. 431. Broker failing to report finding lender not entitled to commissions.

Where an application for a loan is made to a broker, who secures a party willing to make the loan, but does not so notify the applicant, and after the time has elapsed within which the broker was to place the loan, the applicant, without knowledge of the steps taken by the broker, secures a loan from the same person with whom the latter had arranged to place it, the broker is not entitled to commissions. *Biddison v. Johnson*, 50 Ill. App. 173. See also Secs. 235, 312, 471.

Sec. 432. Where broker negotiated with two jointly, sale by owner to one bars commissions.

Plaintiff employed as a broker by defendant to sell certain real estate, but not having the exclusive right to sell, carried on negotiations with two persons for a purchase by them to-

gether, but did not succeed in effecting a sale; afterward, one of such persons offered defendant the same price for which plaintiff was authorized to sell, which defendant accepted; it did not appear that plaintiff had had negotiations with such person for a separate purchase by him, or that such offer by him was the result of his negotiations with plaintiff. *Held*, that plaintiff could not recover commissions on the sale. *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345; *Nadler v. Menschel*, 110 N. Y. S. 384. See also Sec. 437.

Sec. 433. Broker not entitled to commissions where contract void by statute of frauds.

A real estate broker is not entitled to commissions, where a sale to his customer is not consummated, and the executory contract of sale is not binding under the statute of frauds. *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134. See also Sec. 602.

A real estate agent is not entitled to commissions on an invalid sale. *Volker v. Fisk* (N. J. Eq. '09), 72 A. 1011.

Sec. 434. Principal capriciously refusing to appraise can not deprive broker of commissions.

Where a broker is employed to negotiate for a house his compensation to be paid for in diamonds, no particular diamonds being particularly identified, and the broker finds a house and the principals agree as to the price, the broker can not be deprived of his compensation by his employer's capricious refusal to agree to any mode of appraising the diamonds. *West v. Lynch*, 1 City Court R. (N. Y.) 225. See also Sec. 454.

Sec. 435. Where purchaser refusing to take, knew the real length of lot, broker barred commissions.

In an action by a real estate broker to recover commissions earned, on the ground that the purchaser refuses to take the property on account of false representations of the length of the lot, a verdict for defendant is clearly right, where it appears that the purchaser knew the exact length of the lot before he agreed to purchase it. *Sloman v. Bodwell*, 24 Neb. 790, 40 N. W. 321. See also Secs. 183, 451.

A broker familiar with a lot was employed to procure a pur-

chaser. The owner stated to the broker that the lot had a frontage of 168 feet on the street; a purchaser procured by the broker refused to complete the purchase because the frontage was only 165 feet. *Held*, that the broker was not entitled to commissions, since he was employed to procure a purchaser for the lot as it was, and the fact that the owner told the proposed purchaser during the negotiations that the frontage was 168 feet, did not affect the contract of brokerage. *Keough v. Meyer*, 111 N. Y. S. 1, 127 App. Div. 273. See also Sec. 451.

Sec. 436. Where vendor signifies repudiation of contract tender not necessary for broker to recover commissions.

Where a contract of sale has been repudiated by the vendor, proof of tender of performance by the vendee is not necessary, in an action by the broker against the vendor for his commissions on the sale, when it is shown that it would not have been of any avail if made. *Harwood v. Diemer*, 41 Mo. App. 48.

Sec. 437. Where broker unsuccessfully negotiated with F, sale by owner to F and others bars commissions to broker.

Where a broker's contract for the sale of land required not only the finding of a purchaser but a sale to him by the broker, and it was specially agreed that no commission should be paid unless a sale was actually made by the broker, he could not recover commissions for a sale made to F. and others by the owner, because he had submitted the land to F. alone, who was unwilling to purchase on the terms fixed by the owner. *Burch v. Hester & Lawhorn* (Tex. Civ. App. '08), 109 S. W. 399; *English v. Wm. George Realty Co.* (Tex. Civ. App. '09), 117 S. W. 996. See also Sec. 432.

Sec. 438. Broker not entitled to commissions where party to make exchange does not show good faith.

A contract of exchange negotiated by a broker, incompletely executed by the broker's principals, does not show willingness to perform by the alleged purchaser, where the form of the contract and the whole of the signatures thereto show that some of the conditions upon which the purchaser insisted could not be complied with. *Schulte v. Meehan*, 133 Ill. App. 491.

Sec. 439. Unless broker has exclusive agency not entitled to commissions on sale by another agent.

A broker who is unsuccessful in effecting a transaction in behalf of the principal is not entitled to commissions upon the success of another broker, unless the principal gives him an exclusive agency or promises to pay him a commission even though another agent is successful. *Long v. Herr*, 10 Colo. 380, 15 P. 802; *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218; *Letshaw v. Moore*, 53 Kan. 234, 36 P. 342; *Walton v. N. O., etc., R. Co.*, 23 La. Ann. 398; *Ward v. Fletcher*, 124 Mass. 224; *Danville v. Comstock*, 110 Mich. 693, 69 N. W. 79; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299; *Emberson v. Deane*, 46 How. Pr. 236; *Owens v. Wehrle*, 14 Pa. Super. Ct. 536; *Powell v. Anderson*, 15 Daly, 219, 4 N. Y. S. 706; *Wilson v. Alexander* (Tex. Sup. '92), 18 S. W. 1057; *Hennings v. Parsons*, 108 Va. 1, 61 S. E. 866. See also Sec. 445.

Sec. 440. Broker entitled on sale by owners to proportionate commissions on share of two tenants in common.

Where a broker had the exclusive control of property for the purpose of sale so far as two of the several tenants in common could confer it, and was attempting to sell when the owners sold, he can recover a commission on the two tenants' share of the purchase money. *Goldsmith v. Case*, 80 S. C. 341, 61 S. E. 555.

CHAPTER II.

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Sec. 441. Broker preventing competitive bidding not entitled to commissions.

A broker employed by a guardian of an incompetent person to sell real estate is not entitled to commissions if he offered money to another bidder to induce him to refrain from bidding on the same against the purchaser procured by the broker, and without the guardian's knowledge represented the purchaser, and worked to secure the real estate for him at the lowest possible price. *Trees v. Millikin* (Ind. App. '08), 85 N. E. 123. See also Sec. 217.

Sec. 442. Broker can not charge commissions against beneficiary.

Recovery of a real estate broker's commissions for procuring a purchaser can not be charged against one who merely had a beneficial interest in the property without authority to sell, and who, so far as she acted in negotiations resulting in the sale, referred the broker to others who alone could convey. *Kirivan v. Pizer*, 109 N. Y. S. 739.

Sec. 443. Volunteers.

A mere volunteer, though he brings the parties together and is the efficient means of procuring a sale, a lease, or an ex-

change of property, is not entitled to a commission. *Albert Booth Cohn v. Lee*, 117 N. Y. S. 550; *Viley v. Pettit*, 96 Ky. 576, 16 Ky. L. R. 650, 29 S. W. 438; *Merrill v. Latham*, 8 Colo. App. 263, 45 P. 524; *Witherbee v. Walker*, 42 Colo. 1, 93 P. 1118; *Keener v. Harrod*, 2 Md. 63; *Fordtran v. Stower*, 113 S. W. 631 (Tex. C. A. '08); *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037; *Sharp v. Hoopes* (N. J. Sup. '06), 64 A. 989; *McClosky v. Thompson*, 56 N. Y. S. 1076, 26 Misc. 735; *Tinkham v. Knox*, 18 N. Y. S. 433; *Henderson v. Sonnebaum*, 30 Pa. Sup. Ct. 182; *Samuel v. Luckenbach*, 205 Pa. St. 428, 54 A. 1091. *Contra*, *Kinder v. Pope*, 106 Mo. App. 536, 80 S. W. 315.

No recovery can be had for services volunteered upon the chance of obtaining future employment. Such services are mere gratuities. Mechem on Ag. Sec. 600.

In the absence of a special contract, finding a purchaser is not enough to entitle to a commission where no sale was made. *Haase v. Schneider*, 98 N. Y. S. 587, 112 App. Div. 336; *Pierce v. Thomas*, 4 E. D. Smith, 354; *Harris v. Reynolds* (N. D. Sup. '07), 114 N. W. 369. Nor does receiving money as part payment on a contract of sale of real estate, and giving the broker a receipt therefor, make him the recipient's agent. Appeal of Jacquett, 3 Walk. (Pa.) 13.

Sec. 444. Interference by breaking into negotiations started by another agent.

A broker interfering with another's transaction is not entitled to a commission. *Reynolds v. Tompkins*, 23 W. Va. 229; *Jenks v. Nobles*, 42 Ill. App. 33. Where a broker to sell advertises the property and shows it to a person, and another broker buys the property and conveys it to that person, the first broker is entitled to recover commissions. *Elemendorf v. Golden*, 37 Wash. 664, 80 P. 264.

Where a broker, through a letter improperly reaching him, obtains information and directs the seeker to the owner, he is not entitled to commissions on an exchange of properties afterwards effected. *Hamilton v. Gillander*, 49 N. Y. S. 663, 26 App. Div. 156. Where a broker, through a mistake in telephoning the owner, telephoned another broker bearing the

same name, who thereupon effected a sale, the latter was not entitled to commissions. *Shapiro v. Shapiro*, 103 N. Y. S. 305, 117 App. Div. 817. Where a broker was negotiating with a customer whom he introduced to the owner, and the latter told the customer he could buy cheaper through another agency, and a sale was effected through the latter, the former agent was entitled to the commission. *Gilmore v. Freshaur*, 126 Mo. App. 299, 102 S. W. 1107.

A broker who fails to procure a purchaser on the terms proposed and another interferes and sells on different terms, or at the same price, is not entitled to commissions. *Carlson v. Nathan*, 43 Ill. App. 364; *Armes v. Cameron*, 19 D. C. 435; *Mears v. Stone*, 44 Ill. App. 444; *Tinsley v. Scott*, 69 Ill. App. 352; *Livezy v. Miller*, 61 Md. 336; *Crowningshield v. Foster*, 169 Mass. 237, 47 N. E. 879; *Wolff v. Rosenberg*, 67 Mo. App. 403; *Northcupp v. Diggs*, 128 Mo. App. 217, 106 S. W. 1123; *Chandler v. Sutton*, 5 Daly (N. Y.), 112; *Powell v. Anderson*, 15 Daly, 219, 4 N. Y. S. 706; *Holly v. Townsend*, 2 Hilt. (N. Y.) 34; *De Zavola v. Rozaliner*, 84 N. Y. S. 969; *Friedman v. Havemeyer*, 56 N. Y. S. 97, 37 App. Div. 518; *Felman v. O'Brien*, 51 N. Y. S. 309, 23 Misc. 341; *Powell v. Lamb*, 1 N. Y. S. 431; *Rae v. Kane*, 106 N. Y. S. 47, 121 App. Div. 494; *Land Mtge. Bk. v. Hargis* (Texas Civ. App. '02), 70 S. W. 352.

Where a broker put his principal into communication with a prospective purchaser, who proposed making a proposition, but later bought the property through another agent at a slightly reduced price, the first agent having set on foot inquiries and negotiations that culminated in a sale, was entitled to the commissions. *Cunliff v. Hansmann*, 97 Mo. App. 467, 71 S. W. 368.

A broker is entitled to commissions where the principal interferes with the customer and concludes the transaction himself. *Williams v. Bishop*, 11 Colo. App. 378, 53 P. 239.

A broker who finds a purchaser and negotiates with him to sell the land, and when the sale is nearly completed, another broker meets the customer, who tells him of the offer made by the first broker, and with full knowledge of the first broker's negotiations the second broker sells the property for a less sum

to the customer, and the owner, ignorant of the first broker's negotiations, concludes the transaction, the owner is liable for commissions to the first broker. *Reynolds v. Tompkins*, 23 W. Va. 229; *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207. See also Sec. 446.

The principal can not interfere with negotiations started by the broker, revoke his authority, and sell the land to his customer, or through another broker, and escape liability for commissions to the first broker, the customer not having abandoned the idea of purchasing. *Day v. Porter*, 161 Ill. 235, 43 N. E. 1073; *Gillet v. Corum*, 7 Kan. 156; *Corning v. Calvert*, 2 Hilt. (N. Y.) 56; *Budd v. Zoller*, 52 Mo. 238; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892.

Sec. 445. The first broker who succeeds is entitled to the commission.

Where two or more brokers are employed, ordinarily the first who succeeds in actually producing a purchaser and consummating a sale is entitled to full commissions. *Whewell v. McLernon Realty & Const. Co.*, 120 N. Y. S. 72; *Daniels v. Columbia H. Land Co.*, 9 App. Cas. (D. C.) 483; *O'Toole v. Dolan*, 129 Cal. 471, 62 P. 30; *Glenn v. Davidson*, 37 Md. 365; *McCan v. Bailey*, 60 Mo. App. 456; *Jennings v. Trummer*, 52 Ore. 149; 96 P. 874; *Glasscock v. Vanfleet*, 100 Tenn. 603, 46 S. W. 449; *Yarborough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645; *Osler v. Moore*, 8 Brit. Col. 115; *Frinck v. Gilbert* (Wash. Sup. '09), 101 P. 1088.

In some jurisdictions the first broker who brings the parties together and induces the seller and the purchaser to enter into the contract, is entitled to the commission. *Higgins v. Miller*, 109 Ky. 209, 58 S. W. 580, 22 Ky. L. R. 702; *Baker v. Thomas*, 33 N. Y. S. 613, 12 Misc. 432; *De Zavola v. Rozaliner*, 84 N. Y. S. 969. *Dalke v. Siryer* (Wash. Sup. '09), 105 P. 1031.

Where property is placed with several brokers the first who procures a contract of sale and obtains part payment of the purchase money, is entitled to the commission. *Eggleston v. Austin*, 27 Kan. 245; *Stewart v. Woodward*, 7 Kan. App. 633, 53 P. 148; *O'Toole v. Dolan*, 129 Cal. 471, 62 P. 30; *Livezy v. Müller*. 61 Md. 336; *McCann v. Bailey*, 60 Mo. App. 456;

Yarborough v. Creager (Tex. Civ. App. '03), 77 S. W. 645; *Bray v. Chandler* 18 C. B. (Eng.) 718, 86 E. C. L. 718; *Murray v. Curry*, 7 C. & P. (Eng.) 584, 32 E. C. L. 771.

Where property is placed with a real estate agent for sale and a sale is brought about through his agency, he is entitled to his commissions, even though the first negotiations are conducted without his knowledge, and the owner, in order to make the sale is compelled to vary the original price and terms. *Barton v. Rogers*, 84 Ill. App. 49; *McGuire v. Carlam*, 61 Ill. App. 295; *Jenks v. Nobles*, 42 Ill. App. 33; *Dowling v. Merrikk*, 165 Mass. 491, 43 N. E. 295; *Smith v. Truitt*, 107 Mo. App. 1, 80 S. W. 686; *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104; *Wright v. Brown*, 68 Mo. App. 577; *Brennan v. Roach*, 47 Mo. App. 290; *Gibson's Est.*, 3 Pa. Dist. 147, 14 Pa. Co. Ct. 241; *Shipman v. Frech*, 1 N. Y. S. 67.

Where the purchaser begins negotiations for the purchase of certain property through an agent and completes through other agents by direct negotiations, without the knowledge of the first broker, can not deprive the latter of his right to commissions. *Crowe v. Miss. Valley Trust Co.*, 85 Mo. App. 601.

A broker authorized to purchase, who made active efforts, but another first procured a satisfactory offer, the first broker was not entitled to a commission. *Freeman v. Polstein*, 97 N. Y. S. 1032, 49 Misc. 644.

One who does not himself produce the purchaser, but who introduces to the seller, as a prospective purchaser, one who, acting under an independent brokerage arrangement with the owner, makes a sale, the first broker is not entitled to commissions. *Peek v. Slifer*, 122 Ill. App. 21; *Latshaw v. Moore*, 53 Kan. 234.

Where a broker having property for sale called the attention of another broker thereto, and he sold, the first was not entitled to a commission. *Shapiro v. Shapiro*, 103 N. Y. S. 305, 117 App. Div. 817.

A sale made by the second agent to a client of the first, but at a lower price, did not entitle the first to a commission. *Ames v. Cameron*, 19 D. C. 435; *Mears v. Stone*, 44 Ill. App. 444; *Wolff v. Rosenberg*, 67 Mo. App. 403; *Friedman v. Havemeyer*, 56 N. Y. S. 97, 37 App. Div. 518; *Felman v. O'Brien*,

51 N. Y. S. 309, 23 Misc. 341; *Powell v. Anderson*, 15 Daly (N. Y.), 219, 4 N. Y. S. 706; *Hendricks v. Daniels*, 19 N. Y. S. 414; *Powell v. Lamb*, 1 N. Y. S. 431.

Sec. 446. Broker who was the procuring cause of the sale is entitled to the commission.

The agent who is the procuring cause of the sale is entitled to compensation.

ARKANSAS.

Steivel v. Lally (Ark. Sup. '09), 115 S. W. 1134; *Bogne v. Marshall* (Ark. Sup. '08), 114 S. W. 714; *Hunton v. Marshall*, 76 Ark. 375, 88 S. W. 963; *Scott v. Patterson*, 53 Ark. 419, 13 S. W. 419.

CALIFORNIA.

Zeimer v. Antisell, 75 Cal. 509, 17 P. 642.

COLORADO.

Anderson v. Smythe, 1 Colo. App. 253, 28 P. 478; *Babcock v. Merritt*, 1 Colo. App. 84, 27 P. 882; *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267; *Lawrence v. Weir*, 3 Colo. App. 401, 33 P. 646; *Scott v. Lloyd*, 19 Colo. 401, 35 P. 733; *Quinby v. Telford*, 4 Colo. App. 210, 35 P. 276; *Duncan v. Borden*, 13 Colo. App. 481, 59 P. 60; *Leech v. Clemons*, 14 Colo. App. 45 59 P. 230; *Wheeler v. Beers* (Colo. Sup. '09), 101 P. 758.

CONNECTICUT.

Hoadley v. Danbury Sav. Bk., 71 Conn. 599, 42 A. 667, 44 L. R. A. 321; *Duncan v. Kearney*, 72 Conn. 585, 45 A. 358; *Williams v. Clowes*, 75 Conn. 155, 52 A. 820.

DELAWARE.

Hawkins v. Chandler, 8 Houst. (Del.) 434, 32 A. 464.

DISTRICT OF COLUMBIA.

Bryan v. Abert, 3 App. (D. C.) Cas. 180; *Clark v. Morris*, 30 App. (D. C.) Cas. 553.

GEORGIA.

Indian Trust Co. v. Sandlein, 125 Ga. 222, 54 S. E. 65.

IDAHO.

Church v. Denning, 14 Ida. 776, 96 P. 263.

ILLINOIS.

Henry v. Stewart, 185 Ill. 448, 57 N. E. 190; *Rigdon v. Moore*, 226 Ill. 382, 80 N. E. 901; *Sievers v. Griffin*, 14 Ill. App. 63; *Davis v. Gassett*, 30 Ill. App. 41; *Adams v. Decker*, 34 Ill. App. 17; *Jenks v. Nobles*, 42 Ill. App. 33; *Clark v. Nessler*, 50 Ill. App. 550; *Watts v. Howard*, 51 Ill. App. 243; *Neufeld v. Oren*, 60 Ill. App. 350; *McGuire v. Carlan*, 61 Ill. App. 295; *Pate v. March*, 65 Ill. App. 482; *Barton v. Rogers*, 84 Ill. App. 49; *Dean v. Archer*, 103 Ill. App. 455; *Shannon v. Potts*, 117 Ill. App. 80; *Rigdon v. Strong*, 128 Ill. App. 447; *West End Store v. Mann*, 133 Ill. App. 544; *Finch Bros. v. Betz*, 134 Ill. App. 471; *Dickson v. Owens*, 134 Ill. App. 561; *Patten v. Willis*, 134 Ill. App. 645; *Gould v. Ricard*, 136 Ill. App. 322; *Wright v. McClintock*, 136 Ill. App. 438; *Stine v. Ferry* (Ill. App. '09), 88 N. E. 186; *Winetur v. Jones*, 113 Ill. App. 129.

INDIANA.

Clifford v. Meyer, 6 Ind. App. 633, 34 N. E. 23; *Mullen v. Bowen*, 26 Ind. App. 253, 59 N. E. 419; *Shelton v. Lundin* (Ind. App. '10), 90 N. E. 387.

IOWA.

Kelley v. Stone, 94 Iowa, 316, 62 N. W. 842; *Stanford v. Bell*, 99 Iowa, 545, 68 N. W. 817; *Semple v. Rand*, 112 Iowa, 616, 84 N. W. 683; *Rounds v. Alee*, 116 Iowa, 345, 89 N. W. 1098; *Hun v. Ashton*, 121 Iowa, 265, 96 N. W. 745; *Gibson v. Hunt* (Iowa Sup. '03), 94 N. W. 277; *Lewis v. Susmilch*, 130 Iowa, 203, 106 N. W. 624.

KANSAS.

Driesbach v. Rollins, 39 Kan. 268, 18 P. 187; *Marlott v. Elliott*, 69 Kan. 477, 77 P. 104; *Votaw v. McKeever*, 76 Kan. 870, 92 P. 1120.

KENTUCKY.

Higgins v. Miller, 109 Ky. 203, 22 L. R. 702, 58 S. W. 580; *Collier v. Johnson*, 23 Ky. L. R. 2453, 67 S. W. 830; *Hopkins v. Moseley*, 31 Ky. L. R. 1308, 105 S. W. 104; *Hobbs v. Miller*, 14 Ky. L. R. 719.

LOUISIANA.

Taylor v. Martin, 109 La. 137, 33 S. 112.

MAINE.

Straut v. Hubbard (Me. Sup. '08), 71 A. 1020.

MARYLAND.

Schwartz v. Yearly, 31 Md. 270; *Livezy v. Miller*, 61 Md. 336; *Walker v. Baldwin*, 106 Md. 619, 68 A. 25.

MASSACHUSETTS.

Desmond v. Stebbins, 140 Mass. 339, 5 N. E. 150; *Dowling v. Merrill*, 165 Mass. 491, 43 N. E. 295; *Whitcomb v. Macon*, 170 Mass. 479, 49 N. E. 742; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *Sullivan v. Tufts* (Mass. Sup. '09), 89 N. E. 239; *Willard v. Wright* (Mass. Sup. '09), 89 N. E. 559.

MICHIGAN.

Ellsmore v. Gamble, 62 Mich. 543, 29 N. W. 97; *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503.

MINNESOTA.

Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345; *Putman v. Howe*, 39 Minn. 363, 40 N. W. 258.

MISSOURI.

Brennan v. Roach, 47 Mo. 290; *Stande v. Blesch*, 42 Mo. App. 578; *Russell v. Poor* (Mo. App. '08), 119 S. W. 433; *Goffe v. Gibson*, 18 Mo. App. 1; *Ramsey v. West*, 31 Mo. App. 676; *Millan v. Porter*, 31 Mo. App. 563; *Wright v. Brown*, 68 Mo. App. 577; *Crowley v. Somerville*, 70 Mo. App. 376; *Campbell v. Vanstine*, 73 Mo. App. 84; *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104; *McCreary v. Kellogg*, 106 Mo. App. 597, 81 S. W. 465; *Smith v. Truitt*, 107 Mo. App. 1, 80 S. W. 686; *Sallee v. McMurray*, 113 Mo. App. 253; 88 S. W. 151; *Glade v. Eastern Ill. Min. Co.*, 129 Mo. App. 443, 107 S. W. 1002.

NEBRASKA.

Frenzer v. Lee (Neb. Sup. '02), 90 N. W. 914; *Butler v. Kennard*, 23 Neb. 357, 36 N. W. 579; *St. Felix v. Gries*, 34 Neb. 800, 52 N. W. 821; *Hambleton v. Fort*, 58 Neb. 282, 78 N. W. 498; *Craig v. Weed*, 58 Neb. 782, 79 N. W. 718; *Lewis v. McDonald* (Neb. Sup. '09), 120 N. W. 207; *Wasmer v. Lean*, 32 Neb. 519, 49 N. W. 463.

NEW JERSEY.

Shepherd v. Hadden, 29 N. J. L. 334; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Derrickson v. Quimby*, 43 N. J. L. 373.

NEW YORK.

Lloyd v. Matthews, 51 N. Y. 124; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 415; *Colwell v. Tompkins*, 158 N. Y. 690, 53 N. E. 1124; *Walton v. McMorrow*, 175 N. Y. 493, 67 N. E. 1090; *Shipman v. Frech*, 1 N. Y. S. 67; *King v. Bauer*, 8 N. Y. S. 466; *Turner v. Putnam*, 13 N. Y. S. 567; *Bickard v. Hoffman*, 19 N. Y. S. 472; *Johnson v. Burnheimer*, 19 N. Y. S. 37; *Van Doren v. Jelliff*, 20 N. Y. S. 636, 1 Misc. 354; *Meyers v. Dean*, 29 N. Y. S. 578; 9 Misc. 183; *McKnight v. Thayer*, 21 N. Y. S. 440; *Whitehead v. Helsey*, 22 N. Y. S. 923, 3 Misc. 378; *Baker v. Thomas*, 31 N. Y. S. 993, 11 Misc. 112; *Atwater v. Wilson*, 34 N. Y. S. 153, 13 Misc. 117; *Ware v. Dos Passos*, 38 N. Y. S. 673, 4 App. Div.

32; *Randruff v. Schroeder*, 46 N. Y. S. 943, 21 Misc. 52; *Woods v. Barton*, 47 N. Y. S. 184, 21 Misc. 326; *Wychoff v. Bissell*, 48 N. Y. S. 1018, 24 App. Div. 66; *Hamilton v. Gillander*, 49 N. Y. S. 663, 26 App. Div. 156; *Hay v. Platt*, 21 N. Y. S. 362, 66 Hun, 488; *McNulty v. Rowe*, 59 N. Y. S. 690, 28 Misc. 523; *Goodwin v. Brennecke*, 47 N. Y. S. 266, 21 App. Div. 138; *Burke v. Pfeffer*, 68 N. Y. S. 799, 34 Misc. 794; *Weinstein v. Goldberg*, 40 N. Y. S. 680, 17 Misc. 613, 75 N. Y. St. 84; *De Zavola v. Rosaliner*, 84 N. Y. S. 969; *Schatzberg v. Frosworth*, 84 N. Y. S. 259; *Whiteley v. Terry*, 82 N. Y. S. 89, 83 App. Div. 197; *Summers v. Carey*, 74 N. Y. S. 980, 69 App. Div. 428; *Bellesheim v. Palm*, 66 N. Y. S. 273, 54 App. Div. 77; *Johnson v. Lord*, 54 N. Y. S. 922, 35 App. Div. 325; *Phinney v. Chesebro*, 84 N. Y. S. 449, 87 App. Div. 409; *Woolley v. Buhler*, 25 N. Y. S. 1045, 73 Hun, 158; *Smith v. Seattle, etc., R. Co.*, 25 N. Y. S. 368, 72 Hun, 202; *Martin v. Fegan*, 88 N. Y. S. 472, 95 App. Div. 154; *Doran v. Bernard*, 45 N. Y. S. 387, 18 App. Div. 36; *Southwick v. Swavinski*, 99 N. Y. S. 1079, 114 App. Div. 681; *O'Shea v. Brill*, 108 N. Y. S. 1020; *Dreyer v. Rush*, 42 How. Pr. 22, 3 Daly, 434; *Harris v. Burt-nell*, 2 Daly, 189; *Moracella v. Odell*, 3 Daly, 123; *Jungeblut v. Gindra*, 118 N. Y. S. 942; *Winans v. Jaques*, 10 Daly, 487; *Nicholson v. Harrison*, 120 N. Y. S. 923; *Chilton v. Butler*, 1 E. D. Smith, 150; *Morgan v. Mason*, 4 E. D. Smith, 636; *White v. Twitchings*, 26 Hun, 503; *McClave v. Paine*, 2 Sweeney, 407, 41 How. Pr. 140; *Frazer v. Brown*, 67 N. Y. S. 966, 33 Misc. 591; *Glentworthy v. Lathe*, 21 Barb. 145; *Met-calfe v. Gordon*, 83 N. Y. S. 808, 86 App. Div. 368.

NORTH CAROLINA.

Kinsland v. Grimshaw (N. C. Sup. '07), 59 S. E. 1000.

OREGON.

Wolverton v. Tuttlar, 51 Ore. 501, 94 P. 961; *Jennings v. Trummers*, 52 Ore. 149, 96 P. 874.

OHIO.

Roush v. Loeffler, 18 Cir. Ct. 806, 6 O. Cir. Dec. 760.

PENNSYLVANIA.

Earp v. Cummins, 54 Pa. St. 394; *Haines v. Bigner*, 9 Phila. 51; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618; *Inslee v. Jones*, Brightly, 76; *Gibson's Est.*, 3 Pa. Dist. 147, 14 Pa. Co. Ct. 241.

SOUTH CAROLINA.

Goldsmith v. Coxe, 80 S. C. 341, 61 S. E. 555.

SOUTH DAKOTA.

Wychoff v. Kerr (S. D. Sup. '09), 123 N. W. 733.

TEXAS.

Bowser v. Field (Tex. Civ. App. '91), 17 S. W. 45; *Smith v. Fowler* (Tex. C. A. '09), 122 S. W. 598; *Newton v. Dickson* (Tex. Civ. App. '09), 116 S. W. 143; *Brown v. Shelton* (Tex. Civ. App. '93), 23 S. W. 483; *Hahl v. Wickes*, 44 Tex. Civ. App. 76, 97 S. W. 838; *Gray v. Carroll* (Tex. Civ. App. '07), 105 S. W. 214; *West v. Thompson* (Tex. Civ. App. '08), 106 S. W. 1134; *Bowman v. S. W. Land Co.* (Tex. Civ. App. '08), 107 S. W. 585; *Edwards v. Pike* (Tex. Civ. App. '08), 107 S. W. 586; *Schultz v. Zelman* (Tex. Civ. App. '08), 111 S. W. 776; *Peach River Lumber Co. v. Montgomery* (Tex. Civ. App. '08), 115 S. W. 87.

WASHINGTON.

Norris v. Byrne, 38 Wash. 592, 80 P. 808.

WEST VIRGINIA.

Cooper v. Upton (W. Va. Sup. '09), 64 S. E. 523.

ENGLAND.

Bray v. Chandler, 18 C. B. 717, 86 E. C. L. 718; *Murray v. Curry*, 7 C. & P. 584, 32 E. C. L. 771; *Colonial Trust Co. v. Pac. Packing & Nav. Co.*, 158 Fed. 277, 85 C. C. A. 539. Compare Sec. 581.

If a broker is the procuring cause of the sale, the owner can not sell at a lower price, and thereby escape liability for commissions. *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; *Frayner v. Morse*, 55 Neb. 595, 75 N. W. 1103. If the broker be the instrument through whom a sale has been effected, no sort of artifice, deceit or fraud will deprive him of his commission. *Corder v. O'Neill*, 176 Mo. 401, 75 S. W. 764, 774.

The fact that before a sale the broker did not inform the owner that the prospective purchaser was his customer is not altogether controlling. *Metcalfe v. Gordon*, 83 N. Y. S. 808, 86 App. Div. 368. Where a broker is employed to find a purchaser at a price satisfactory to his principal, as a condition to demand commissions he must be the procuring cause of the sale. *Reads v. Hank*, 147 Mich. 42, 110 N. W. 130, 13 D. L. N. 952. A broker who merely called the attention of a church officer to a lot he had for sale, telling him the price, is not the efficient and procuring cause of the sale, where the church refused to purchase through him, and bought the property through another agent. *Witherbee v. Walker*, 42 Colo. 1, 93 P. 1118.

Plaintiff, a real estate broker, with authority to sell land, visited defendant with a purchaser, and thereafter continued negotiations which were never expressly terminated. Without any intervening agency the purchaser decided to buy, but made an arrangement with another real estate broker whereby such broker agreed to divide his commissions with the purchaser, and the latter broker, with full knowledge of plaintiff's negotiations, solicited and received authority to sell the land, the owner not knowing of plaintiff's negotiations with the purchaser. *Held*, that, as between the brokers, plaintiff's efforts were the procuring cause of the sale, and he was entitled to the commissions. *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207. See also Sec. 444.

CHAPTER III.

SECTION.

447. Continuity broken, and its effect upon the rights of the broker.

448. Sequence broken, and its effect upon the broker's right to commissions.

SECTION.

449. Consummation of contract.

450. Introduction of prospective purchaser.

Sec. 447. Continuity broken, and its effect upon the rights of the broker.

Plaintiff had a contract with defendant by which in consideration of special efforts of the former to sell a house belonging to the defendant, and of advertising the house in a circular which plaintiff was to publish, the defendant agreed to pay a certain commission on the sum for which the house should be sold; if the sale was made by any other broker, a minimum price was fixed at which the property was to be sold. *Held*, that the plaintiff was not entitled to any commission where the house was subsequently sold through another broker by the acceptance of a standing offer made through such broker several months after the contract with plaintiff was entered into, and the sale being at a less figure than that named in the contract with plaintiff. *Powell v. Anderson*, 15 Daly (N. Y.), 210, 4 N. Y. S. 706.

Where an owner openly places his property in the hands of rival agents for sale and one makes the sale to a customer with whom the other had first, but unsuccessfully negotiated, the owner is not liable to the latter for commissions. *Carper v. Sweet*, 26 Colo. 547, 57 P. 45; *Wiggins v. Wilson*, 55 Fla. 346, 45 S. 1011; *Girardieu v. Gibson*, 122 Ga. 313, 50 S. E. 91; *Carlson v. Nathan*, 43 Ill. App. 364; *West End Co. v. Mann*, 133 Ill. App. 544; *Platt v. Jahr*, 9 Ind. App. 58, 36 N. E. 294; *Livezy v. Miller*, 61 Md. 336; *Leonard v. Eld-*

ridge, 184 Mass. 594, 69 N. E. 337; *Crowningshield v. Foster*, 169 Mass. 237, 47 N. E. 879; *Chandler v. Sutton*, 5 Daly (N. Y.), 112; *De Zavola v. Rozaliner*, 84 N. Y. S. 969; *Friedman v. Havemeyer*, 55 N. Y. S. 97, 37 App. Div. 518; *Earp v. Cummins*, 54 Pa. St. 394; *Dewall v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Montgomery v. Biering* (Tex. Civ. App. '95), 30 S. W. 508; *Land Mtge. Bk. v. Hargis* (Tex. Civ. App. '02), 70 S. W. 352.

If the broker fails to bring a customer to terms and abandons negotiations, he is not ordinarily entitled to commissions upon a sale made by the owner to the customer. *Watts v. Howard*, 51 Ill. App. 243; *Cullen v. Bell*, 43 Minn. 226, 45 N. W. 428; *Cathcart v. Bacon*, 47 Minn. 34, 49 N. W. 331; *Tooker v. Duckworth*, 107 Mo. App. 231, 80 S. W. 963; *Henkel v. Dunn*, 97 Mo. App. 671, 71 S. W. 735; *Barnard v. Monnott*, 34 Barb. (N. Y.) 90; *Meyer v. Strauss*, 58 N. Y. S. 904, 42 App. Div. 613; *Getzler v. Boehm*, 38 N. Y. S. 52, 16 Misc. 390; *Alden v. Earle*, 121 N. Y. 688, 24 N. E. 705; *Tyng v. Constable*, 71 N. Y. S. 820, 35 Misc. 283; *Miller v. Vining*, 98 N. Y. S. 466, 112 App. Div. 304; *Schano v. Storch*, 107 N. Y. S. 26, 56 Misc. 484; *Jones v. Buck* (Iowa Sup. '09), 120 N. W. 112.

Where a broker employed to sell a whole tract of land or a part thereof, failed, and an attempt was made to discharge him, but he continued his negotiations and the owner afterward sold a portion to the broker's customer, the broker was held entitled to recover a proportionate commission. *Diamond v. Wheeler*, 80 N. Y. S. 416, 80 N. Y. App. Div. 58.

Plaintiffs, to recover under their agreement to negotiate the purchase for defendant of land for certain commissions on the amount of the purchase, must show that through their efforts and negotiations defendant became the purchaser; this is not the case where their efforts to get a price from the owner which defendant would accept failed, and long after their negotiations and dealings with him had ceased, and they and defendant had abandoned hope of reaching an agreement with him, he, on learning that defendant was to commence condemnation proceedings for the land, made an offer to defendant, which was accepted, to submit to arbitration the price at which

defendant should take the property. *Martien v. Mayor, etc., Baltimore*, 109 Md. 260, 71 A. 966.

If a broker, after offering a farm at a price in excess of the lowest price authorized by the owner, which the purchaser said was too high, allowed the purchaser to go with the understanding that the price stated was the lowest which would be accepted, and made no arrangements for further negotiations, and the purchaser notified the owner of the negotiations with the broker, and that he would not deal further with him, and the owner, in good faith, sold the farm to the purchaser, the broker would not be entitled to commissions on the sale. *Heenan v. Harris* (Mich. Sup. '09), 121 N. W. 741, 16 D. L. N. 344.

Sec. 448. Sequence broken, and its effect upon the broker's right to commissions.

A broker who negotiated with one person, who called the attention of another to the property, and that other bought from the vendor, or through another broker, is not entitled to commissions; to be entitled to commissions he must be the procuring cause and not merely a cause of causes. *Baumgarth v. Hayne*, 54 Ill. App. 496; *Gleason v. Nelson*, 162 Mass. 245, 38 N. E. 497; *Vandyke v. Walker*, 49 Mo. App. 381; *Burkholder v. Fonner*, 34 Neb. 1, 51 N. W. 293; *Johnson v. Seidal*, 150 Pa. St. 396, 24 A. 687. See also Sec. 69.

Under somewhat similar circumstances, in another State, a broker was held entitled to recover commissions. *Lincoln v. McClatchie*, 36 Conn. 136. See also *Carnes v. Finnegan*, 198 Mass. 128, 84 N. E. 324.

In the case of *Gleason v. Nelson*, 162 Mass., the court, referring to the Connecticut case, observes that the broker in that case, "advertised the property; A. saw the advertisement, conferred with the broker, and went and told his friend B., in whose behalf he felt an interest, and B. bought the property. It was held that the broker was the procuring cause of the sale and so was entitled to his commission." But, "where there has been no direct communication between the broker and the purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiation which resulted

in the purchase through the means employed by the broker for that purpose. If the broker merely talked about the property with different persons, and one of them of his own accord, and not acting in behalf of the broker, mentioned to another that the property was for sale, and such last mentioned person thereupon looked into the matter and finally became the purchaser, the agency of the broker in inducing the sale was not sufficiently direct to entitle him to a commission." (162 Mass. 249-250.) See the next Section.

Sec. 449. Consummation of contract.

Where a broker is employed to sell or exchange property the terms of the employment may require the completion of the contract or transfer of the title before compensation is earned, unless the act of the principal has prevented performance. *Hyams v. Miller*, 71 Ga. 608; *Kerfoot v. Steele*, 113 Ill. 610; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Stratton v. Sam'l. W. Jones Co.*, 20 Ky. L. R. 1787, 50 S. W. 33; *De Santos v. Taney*, 13 La. Ann. 151; *Didson v. Duraldo*, 2 Rob. (La.) 163; *Carnes v. Howard*, 180 Mass. 569, 63 N. E. 122; *Kronenberger v. Bierling*, 76 N. Y. S. 895, 37 Misc. 817; *Feiner v. Kobke*, 34 N. Y. S. 676, 13 Misc. 499; *Pierce v. Truitt* (Pa. Sup. '88), 12 A. 661; *Michener v. Beiern*, 9 Pa. Co. Ct. 637; *Brennam v. Perry*, 7 Phila. (Pa.) 242; *Lawler v. Armstrong* (Wash. Sup. '09), 102 P. 775; *Pratt v. Patterson*, 7 Phila. (Pa.) 135; *Owen v. Kuhn* (Tex. Civ. App. '03), 72 S. W. 432; *Morton v. Barney*, 140 Ill. App. 333.

Where the contract makes the right to commissions dependent upon consummation, a broker can not recover commissions unless the contract has been consummated and the money paid. *Lindley v. Fay*, 119 Cal. 239, 51 P. 333; *Ballard v. Shea*, 121 Ill. App. 135; *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *West v. Stoeckel*, 6 Ohio Dec. (Rep.) 1082; 10 Am. L. R. 309; *Reichard v. Wallach*, 91 N. Y. S. 347; *Bishop v. Averill*, 17 Wash. 209, 49 P. 237, 50 P. 1024; *Power v. Kane*, 5 Wis. 265.

There is authority to the effect that a broker's right to commissions is not defeated because the principal is unable to com-

ply with the contract, as where independent of the broker he has previously sold the property. *Lane v. Albright*, 49 Ind. 275; *Gregor v. McKee*, 43 N. Y. S. 486, 18 Misc. 613; *Levy v. Rothe*, 39 N. Y. S. 1057, 17 Misc. 402; *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241.

In later New York cases the doctrine has undergone a revision, on the ground that the owner may sell his premises at any time and to any customer who is willing to buy upon his terms, and that commissions may not be collected for customers produced after the premises have been sold. *Hodge v. Appellees*, 107 N. Y. S. 170, 122 App. Div. 437; *Ettinghoff v. Harowitz*, 100 N. Y. S. 1002, 115 App. Div. 571.

A broker employed to secure a loan does not earn his commissions by merely procuring a lender who offers to make the loan, but who, after acceptance by the borrower, refuses to consummate the transaction. *Ashfield v. Case*, 87 N. Y. S. 649, 93 App. Div. 452; *Crasto v. White*, 5 N. Y. S. 718, 52 Hun, 473. See also Sec. 460.

To entitle a real estate broker to his commissions he must produce a person who actually purchases the property by complying with the terms agreed upon, unless his failure to do so is caused by the fault of the vendor. *Richards v. Jackson*, 31 Md. 250; *Briggs v. Rowe*, 1 Abb. Dec. (N. Y.) 189, 4 Keyes 424; *Burnet v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Parker v. Nat. Bdg., etc., Assn.*, 55 W. Va. 134, 46 S. E. 811.

A broker employed to effect a sale is not entitled to commissions until consummation. *Dorrington v. Powell*, 52 Neb. 440, 72 N. W. 587; *Lyle v. Uni. Land & Inv. Co.* (Tex. Civ. App. '95), 30 S. W. 723; *Smith v. Sharp* (Ala. '09), 50 S. 381.

A broker failing to show a completed contract between the seller and the buyer is not entitled to commissions. *Reicherdt v. Wallach*, 91 N. Y. S. 347. A broker who contracted for commissions to be all over a certain net selling price, required a consummation of the sale to earn commissions. *Munroe v. Taylor*, 191 Mass. 483, 78 N. E. 106. See also Secs. 119, 193, 224, 272.

Completion of the contract falls upon the owner after the broker has found a customer ready and willing to buy, where

his contract is to find a purchaser. *Swigert v. Hawley*, 40 Ill. App. 610, reversed on other grounds, 140 Ill. 185.

Sec. 450. Introduction of prospective purchaser.

The introduction by a broker of a prospective purchaser to the principal held sufficient to establish a contract of employment. *Carroll v. O'Shea*, 19 N. Y. S. 374. Introduction to the owner, followed by a sale, entitles the broker to commissions, although the sale is made for a less price and upon different terms. *Henry v. Stewart*, 185 Ill. 448, 57 N. E. 190; *Dean v. Archer*, 103 Ill. App. 455; *Pete v. March*, 65 Ill. App. 482; *Hafner v. Herron*, 60 Ill. App. 592, affirmed 165 Ill. 242, 46 N. E. 211; *Gibson v. Hunt* (Iowa Sup. '03), 94 N. W. 277; *Driesback v. Rollins*, 39 Kan. 268, 18 P. 187; *Schwartz v. Yearly*, 31 Md. 270; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150; *Reishus-Reimer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186; *Haug v. Haughan*, 51 Minn. 558, 53 N. W. 874; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Sallee v. McMaury*, 113 Mo. App. 253, 88 S. W. 157; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Lloyd v. Matthews*, 51 N. Y. 124; *Goodwin v. Brennecke*, 47 N. Y. S. 266, 21 App. Div. 138; *Glentworth v. Luther*, 21 Barb. 145; *Baker v. Thomas*, 31 N. Y. S. 993, 11 Misc. 112; *Van Doren v. Jelleffe*, 20 N. Y. S. 636, 1 Misc. 354; *Turner v. Putnam*, 13 N. Y. S. 567; *Rousch v. Loeffler*, 18 Ohio Cir. Ct. 806, 6 O. Cir. Dec. 760; *Insloe v. Jones*, Brightly (Pa.) 76; *Haines v. Bigner*, 9 Phila. (Pa.) 51; *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381.

A broker is entitled to commissions, although he took no part in the negotiations, where a sale resulted from his introducing a customer to the owner; irrespective of the purchase price, and although the sale was made by the owner. *Holland v. Howard*, 105 Ala. 538, 17 S. 35; *Snyder v. Fearer*, 87 Ill. App. 275; *Keeler v. Grace*, 27 Ill. App. 427; *Henderson v. Collins*, 69 Iowa, 51, 28 N. W. 431; *Jones v. Adler*, 34 Md. 440; *Delta, etc., Land Co. v. Wallace*, 83 Miss. 656, 36 S. 263; *Timberman v. Craddock*, 70 Mo. 638; *Crone v. Miss. Valley Trust Co.*, 85 Mo. App. 601; *Bass v. Jacobs*, 63 Mo. App. 393; *Jones v. Berry*, 37 Mo. App. 125; *Nicholas v. Jones*, 23 Neb. 813, 37 N. W. 679;

Butler v. Kennard, 23 Neb. 357, 36 N. W. 579; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Lloyd v. Matthews*, 51 N. Y. 124; *Gillen v. Wise*, 14 Daly (N. Y.) 480, 15 N. Y. St. 367; *Hanford v. Shafter*, 4 Daly, 243; *Ludlow v. Carman*, 2 Hilt. (N. Y.) 107; *O'Toole v. Tucker*, 38 N. Y. S. 969, 16 Misc. 485, affirmed 40 N. Y. S. 695, 17 Misc. 554; *Fidelity Ins. Co.'s Appeal*, 161 Pa. St. 177, 28 A. 1079; *Gibson's Est.*, 3 Pa. Dist. 147, 14 Pa. Co. Ct. 241; *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538; *Royster v. Magaveny*, 9 Lea (Tenn.) 148; *Arrington v. Cary*, 5 Baxt. (Tenn.) 609.

The broker who first introduced a prospective purchaser to the owner was held to be entitled to commissions on a sale made through another. *Crone v. Miss. Valley Trust Co.*, 85 Mo. App. 601 A broker is not entitled to compensation for merely introducing a purchaser to the owner, in the absence of a contract of employment, unless his character as agent was known or disclosed at the time. *Keener v. Harrod*, 2 Md. 63. See also Sec. 68.

CHAPTER IV.

SECTION.

451. Effect of representations as to the dimensions of the property offered.

452. Purchaser acting for another.

SECTION.

453. Apportionment.

454. Defeat of broker's right to commissions.

Sec. 451. Effect of representations as to dimensions of the property offered.

Defendant employed plaintiff to sell a piece of property for her representing to him that it was seventy-six feet in depth. Plaintiff procured a purchaser to whom defendant made the same representations, and on his discovering that the lot was in reality but sixty-six feet deep he refused to complete the purchase. *Held*, that plaintiff was not entitled to commissions. *Hausman v. Herdtfelder*, 80 N. Y. S. 1039, 81 App. Div. 46; *Diamond v. Hartley*, 55 N. Y. S. 994, 61 N. Y. S. 1022, 38 App. Div. 87, 47 App. Div. 1. See also Sec. 183, 435.

In an action by a broker to recover commissions for procuring a loan, it appeared that the written portion of the application for the loan was filled in by the broker, and that he was aware, when defendant signed the application, that defendant was uncertain as to the exact dimensions of the lot on which security was to be given, though the dimensions were stated in the application, and the loan was rejected because the dimensions were not correctly given. *Held*, that inasmuch as the broker was equally responsible with the defendant for not disclosing the situation to the lender and for their refusal to make the loan, he could not recover. *Diamond v. Harley*, 61 N. Y. S. 1022, 47 App. Div. 1.

Where a vendee refused to complete a contract for the sale of land by reason of an alleged deficiency in quantity, but it was shown that the contract written by one of the vendor's brokers contained a mistaken description and included land which the vendor did not own, without his knowledge and con-

sent, but by reason of the receding of a lake on which the land bordered, the farm contracted to be conveyed actually contained more than the number of acres specified, the brokers were not entitled to a commission. *Scott v. Gage*, 16 S. D. 285, 92 N. W. 37.

Where the principal gives the broker a card describing the lot as twenty-three feet wide, and the broker in good faith makes this statement to a prospective purchaser, and the sale falls through because the true width of the lot falls short five inches, the broker was held entitled to recover his commissions. *Cohen v. Farley*, 58 N. Y. S. 1102, 28 Misc. 168. This conflicts with later decisions in the same jurisdiction. *Hausman v. Herdtfelder*, 80 N. Y. S. 1039, 81 App. Div. 46; *Diamond v. Hartley*, 61 N. Y. S. 1022, 47 App. Div. 1.

Where a real estate broker procures a purchaser of land at the agreed price, and the owner sells to him; on discovering that the land does not contain the supposed number of acres the broker is entitled to his commissions at the agreed rate on the latter sum. *Hoefling v. Hableton*, 84 Tex. 517, 19 S. W. 689. On the other hand, another court holds, where the terms of sale are fixed by the vendor, in accordance with which the broker undertakes to produce a purchaser, and upon the procurement of a purchaser, the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that a sale is made, or terms or conditions are offered which the proposed buyer is ready and willing to accept, the broker will be entitled to his commissions at the rate specified in his agreement with the principal. *Stewart v. Mather*, 32 Wis. 344. Compare *Bowman v. Hartman*, 27 O. Cir. Ct. 309.

In an action by a real estate agent to recover commissions earned, on the ground that the purchaser refused to take the property on account of false representations of the length of the lot, a verdict for defendant is clearly right, where it appears that the purchaser knew the exact length of the lot before he agreed to purchase. *Sloman v. Bodwell*, 24 Neb. 790, 40 N. W. 321. The same is true where the broker knew the size of the lot. *Keough v. Meyer*, 111 N. Y. S. 1, 127 App. Div. 273.

Where plaintiff agreed with defendant to procure for him a person who would negotiate for the purchase of his property, and he did procure such a person, and negotiations were entered into and carried on, but resulted in a sale of a less amount of property than was contemplated in the agreement under which plaintiff undertook to procure such purchaser, he was entitled to recover commissions on the quantity sold. *Bowman v. Hartman*, 27 O. Cir. Ct. 309. Compare *Stewart v. Mather*, 32 Wis. 344. Broker entitled to commission where sale was defeated by misrepresentation made to the purchaser by an employe of the seller. *Hugill v. Weekley*, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A., N. S. 1262.

Sec. 452. Purchaser acting for another.

The fact that the purchaser secured by the real estate broker was acting in behalf of another, does not affect the broker's right to a commission, if the purchaser was able, ready and willing to buy on the terms authorized by the principal, and no binding written contract of sale is required. *Gelott v. Ridge*, 117 Mo. 553, 23 S. W. 882. See also Sec. 487.

Failure of a broker to disclose to the vendors that the purchaser was acting as the agent for an undisclosed principal, does not affect the broker's right to commissions, the purchaser being financially able to carry out his contract, so that the vendors are not injured. *Lawler v. Armstrong* (Wash. Sup. '09), 102 P. 775.

Sec. 453. Apportionment.

Where the evidence shows that defendant's contract to pay plaintiff certain commissions for the sale of lands is either a joint contract with that of other owners of the land or his individual contract, the court properly refused to charge that defendant is only liable for his share of the commission to the extent of his individual interest. Their liabilities can not be apportioned. *Mousseau v. La Roche*, 80 Ga. 568, 5 S. E. 780.

Sec. 454. Defeat of broker's right to commissions.

A real estate agent who carries on the negotiations between the parties and finally brings them together, is entitled to his

commissions, though the trade is eventually effected by the owner himself or by a third person acting for him. *Larson v. Thoma* (Iowa Sup. '09), 121 N. W. 1059; *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419; *Hancock v. Stacey* (Tex. Civ. App. '09), 116 S. W. 177; *Howe v. Werner*, 7 Col. App. 530, 44 P. 511; *Gresham v. Connelly*, 114 Ga. 906, 41 S. E. 42; *Hutton v. Renner*, 74 Ill. App. 124; *Ellis v. Dunsworth*, 49 Ill. App. 187; *Gibson v. Hunt* (Iowa Sup. '03), 94 N. W. 277; *Hubbard v. Leiter*, 145 Mich. 387, 108 N. W. 735, 13 D. L. N. 477; *Headen v. Shepherd*, 29 N. J. L. 334; *Somers v. Westcott*, 66 N. J. L. 551, 49 A. 462; *Woolley v. Loew*, 80 Hun, 294, 30 N. Y. S. 86; *Carroll v. Pettit*, 67 Hun, 418, 22 N. Y. S. 250; *Chilton v. Butler*, 1 E. D. Smith (N. Y.) 150; *Esmond v. Kingsley*, 3 N. Y. S. 696; *Lynch v. McKenno*, 58 How. Pr. (N. Y.) 42; *Keys v. Johnson*, 68 Pa. St. 42; *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923; *Van Tobel v. Stetson, etc., Mill Co.*, 32 Wash. 683, 73 P. 788; *Day v. Porter*, 161 Ill. 235, 43 N. E. 1073; *Church v. Dunham*, 14 Idaho, 776, 96 P. 203, 205; *Jennings v. Trumin*, 52 Ore. 149, 96 P. 874.

After the principal and the customer found by the broker agree upon terms, the broker's right to a commission can not be defeated by the principal's transferring the property indirectly by a deed to a third person who reconveyed to the broker's customer. *Williams v. Bishop*, 11 Colo. App. 378, 53 P. 289; *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927; *Steidl v. McClymonds*, 90 Minn. 205, 95 N. W. 906; *Burke v. Cogswell*, 39 Minn. 344, 40 N. W. 251; *Oarvin v. Abels-Gold R. Co.*, 110 N. Y. S. 582, 126 App. Div. 329; *Martin v. Fegan*, 88 N. Y. S. 472, 95 App. Div. 154; *Minister v. Benoliel*, 66 N. Y. S. 943, 32 Misc. 630, reversed on other grounds, 67 N. Y. S. 1044, 33 M. 586; *Konner v. Anderson*, 66 N. Y. S. 338, 32 Misc. 511; *Fox v. Byrnes*, 52 N. Y. Super. Ct. 150.

Nor by an agreement declaring the sale off. *O'Neill v. Printz*, 115 Mo. App. 215, 91 S. W. 174. In order to defeat the broker's right to a commission, the principal must have substantial ground for refusing to complete the transaction, and have done nothing to estop setting it up. *Alabama Loan Co. v. Deans*, 94 Ala. 377, 11 S. 17; *Fiske v. Soule*, 87 Cal. 313, 25 P. 430; *Cawker v. Apple*, 15 Colo. 141, 25 P. 181;

Peabody v. Dewey, 51 Ill. App. 260, affirmed 153 Ill. 657, 37 N. E. 977, 27 L. R. A. 322; *Indiana Ber. Asp. Co. v. Robinson*, 29 Ind. App. 59, 63 N. E. 797; *Felts v. Butcher*, 93 Iowa, 414, 61 N. W. 991; *Hayden v. Grillo*, 35 Mo. App. 647; *Bailey v. Chapman*, 41 Mo. 536; *Hartford v. McGillicuddy*, 103 Md. 224, 68 A. 860; *Carpenter v. Rynders*, 52 Mo. 278; *Blaydos v. Adams*, 35 Mo. App. 526; *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Finke v. Menke*, 67 N. Y. S. 954, 33 Misc. 769; *Ernst v. Loeb*, 108 N. Y. S. 631; *Kirwan v. Barney*, 61 N. Y. S. 122, 29 Misc. 614; *Friend v. Jetter*, 43 N. Y. S. 287, 19 Misc. 101; *Delaplane v. Turney*, 44 Wis. 31; *Greenwald v. Rosen*, 113 N. Y. S. 764, 61 Misc. 260.

The fact that the principal does not own the property which he employs the broker to sell does not defeat the broker's right to compensation on procuring a purchaser. *Smith v. Schiele*, 93 Cal. 144, 28 P. 857. Where, at the date of the contract of employment the principal had only an option on the land, or for any other reason can not avail himself of the offer procured by the broker. *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793. False representations of the broker concerning the property which he was negotiating to sell, do not defeat his right to commissions where it appears that the purchaser, under the contract of sale, made independent inquiries as to the subject of the representations. *Friend v. Jette*, 41 N. Y. S. 560, 18 Misc. 368. Where a principal made false representations that defeated a sale made by the broker, this did not deprive the broker of his commissions. *Glentworth v. Luther*, 21 Barb. (N. Y.) 145. Compare *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477.

A vendor can not escape liability to the broker for commissions by himself completing a sale to a purchaser with whom the broker had been negotiating, by including in the sale other lands in addition to those the broker was employed to sell. *Ransom v. Weston*, 110 Mich. 240, 68 N. W. 152. Where a broker is employed to sell land, and when his negotiation is nearly finished the owner limits the time within which a sale must be made and notice be sent to him, and the agent makes a sale without delay and sends notice to the principal within the time limited, that being all that was required of the broker

under the contract, the miscarriage of the notice does not deprive the agent of his commission. *Gibbons v. Sherwin*, 28 Neb. 146, 44 N. W. 99. Where the authority conferred on the broker to sell lands is limited in time, the agent will be entitled to his commission if within that time he procures a purchaser with whom his principal enters into a binding contract of sale and purchase, although the conveyance of the lands is not made until after the time allowed has elapsed. *Crowley Co. v. Meyers*, 69 N. J. L. 245, 55 A. 305; *Cody v. Dempsey*, 83 N. Y. S. 899, 86 App. Div. 335.

Defendant placed his ranch in plaintiffs' hands to sell on commission within a specified time; they found a purchaser who paid to defendant part of the purchase money, and tendered the balance in checks, which defendant refused; after the time specified had expired, defendant, without returning the partial payment, conveyed the ranch to his father, who conveyed it to the purchaser on payment of the balance of the agreed price, defendant saying at the time that he did not intend to pay plaintiffs any commissions. *Held*, that the plaintiffs were entitled to their commissions, the sale being made to their purchaser, and defendant not having repudiated the original contract of sale by returning the money paid upon it. *Wilson v. Sturgis*, 71 Cal. 226, 16 P. 772.

In an action by a real estate agent to recover commissions for trading defendant's house and lot, where it appears that part of the consideration to be paid by the purchaser was a horse, and that defendant objected to the price placed on it, and agreed to take it if a reduction was made, and thereafter, without notice, traded the house and lot to a third person, a verdict for plaintiff is sustained by the evidence. *Tubbs v. Mackintosh*, 31 Neb. 238, 47 N. W. 854; *West v. Lynch*, 1 City Ct. R. (N. Y.) 225. See also Sec. 434.

One who employs a broker to negotiate a sale can not, in an action for commissions, avail himself of the objection that the customer is not able to pay for the premises, if the vendor has accepted the customer as satisfactory and has conveyed the premises to him. *Travis v. Graham*, 48 N. Y. S. 736, 23 App. Div. 214.

Where a principal in an exchange of properties actually re-

ceives a good title to the property conveyed to him, he can not defeat an action by his broker for commissions on the ground that his contract of sale was invalid. *Schlesinger v. Jud*, 70 N. Y. S. 616, 61 App. Div. 453.

Where the owner enters into a contract authorizing a real estate agent to sell his land on commission, within a certain time, he can not revoke the authority and escape liability to the agent, if he secures a purchaser before the time limited, as the result of efforts commenced before such revocation. *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906; *Glover v. Henderson*, 170 Mo. 367, 25 S. W. 175; *Stamets v. Dennison*, 193 Pa. St. 548, 44 A. 575; *Harrison v. Angerson*, 115 Ill. App. 226. (There are authorities holding that the owner has power to rescind, subject to the right of the broker to bring an action for breach of the contract.)

Where a broker employed to bring about a sale of real estate, brought to the owner a responsible purchaser willing to take the premises on the terms outlined by the owner, the broker was entitled to his commissions, although the sale fell through because the owner could not give immediate possession as he had agreed to do. *Putter v. Berger*, 88 N. Y. S. 462, 95 App. Div. 62.

Where a broker has lands placed in his hands for sale at a certain price, and the proposed purchaser does not want the entire tract, and the broker induces an employe to purchase what remained, and the principal, to escape paying commissions, conveys the whole tract to the employe, who conveys to the purchaser the portion he desires, the latter assuming a proportionate amount of the purchase money notes, the broker is entitled to his commissions. *Bogart v. McWilliams* (Tex. Civ. App. '95), 31 S. W. 434; *Diamond v. Wheeler*, 80 N. Y. S. 416, 80 App. Div. 58.

The principal can not defeat the broker's right to compensation by arbitrary or wanton refusal to consummate the sale. *Merriman v. Wickersham*, 141 Cal. 567, 75 P. 180; *Phelps v. Prusch*, 83 Cal. 626, 23 P. 1111; *Nielson v. Lee*, 60 Cal. 555; *Phelan v. Gardner*, 43 Cal. 306; *Millett v. Barth*, 18 Colo. 112, 31 P. 769; *Spalding v. Saltiel*, 18 Colo. 86, 31 P. 486; *Finnerty v. Fritz*, 5 Colo. 174; *Wolver v. Shandy*, 66 Ill. App. 42; *Hecht*

v. *Hall*, 62 Ill. App. 100; *McGuire v. Carlson*, 61 Ill. App. 295; *Flood v. Leonard*, 44 Ill. App. 113; *Heaton v. Clarke*, 122 Iowa, 716, 98 N. W. 597; *Lewis v. Simpson*, 122 Iowa, 663, 98 N. W. 508; *Collins v. Padden*, 120 Iowa, 381, 94 N. W. 905; *Bird v. Phillips*, 115 Iowa, 703, 87 N. W. 414; *Houston v. Boagni*, McGloin (La.), 164; *Schwartz v. Yearly*, 31 Md. 270; *Gwinnup v. Sibert*, 106 Mo. App. 709, 80 S. W. 589; *Reeves v. Vette*, 62 Mo. App. 440; *Gaty v. Foster*, 18 Mo. App. 639; *Jones v. Stevens*, 36 Neb. 849, 55 N. W. 251; *Mooney v. Elder*, 56 N. Y. 238; *Barnard v. Monnott*, 1 Abb. Dec. (N. Y.) 108, 3 Keyes, 203, 33 How. Pr. 440; *Snydam v. Healy*, 87 N. Y. S. 669, 93 App. Div. 396; *Smith v. Smith*, 1 Sweeney (N. Y.), 552; *Hayne v. O'Connor*, 1 Sweeney (N. Y.), 472, 41 How. Pr. 287; *Simpson v. Smith*, 36 Misc. 815, 74 N. Y. S. 849; *York v. Nash*, 42 Ore. 321, 71 P. 59; *Fisk v. Henare*, 13 Ore. 156, 9 P. 322; *Haskins v. Lewis*, 30 Ohio Cir. Ct. 603; *Hunt-emer v. Arent*, 16 S. D. 465, 93 N. W. 653; *McLane v. Goode* (Tex. Civ. App. '02), 68 S. W. 707; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346; *Koch v. Emmerling*, 63 U. S. (22 How.) 69; *Greenwood v. Burton*, 27 Neb. 808, 44 N. W. 28; *Bond v. Webster*, 128 Wis. 118, 107 N. W. 23; *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215.

After notice that the broker has a customer, the principal can not sell to another, and thus escape the payment of the commission. *Phelan v. Gardner*, 43 Cal. 306; *Showaker v. Kelly*, 21 Pa. Super. Ct. 390; *Sullivan v. Hampton* (Tex. Civ. App. '95), 32 S. W. 235; *Frinck v. Gilbert* (Wash. Sup. '09), 101 P. 1088. But see where principal refused offer and sold to same party for twice as much, and broker was held not entitled to commissions. *Gardner v. Pierce*, 116 N. Y. S. 155. See Sec. 15.

The refusal of the wife to join in a deed of conveyance is insufficient to excuse the husband and principal for failing to carry out the sale so as to defeat the broker's right to a commission for finding a purchaser. *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301. *Goldberg v. Gelles*, 68 N. Y. S. 400, 33 Misc. 797; *Clapp v. Hughes*, 1 Phila. (Pa.) 382. The same rule was applied where the sale failed because the husband and wife could not agree as to a division of the purchase

money. *Purdy v. Wilson*, 130 Mo. App. 150, 108 S. W. 1124.

Where a broker found a purchaser his agency closed, and his afterwards taking a retainer from the purchaser to see that the papers were properly executed presented no ground for defeating a recovery of his commissions. *Short v. Millard*, 68 Ill. 292. See also Sec. 559.

While an agency for the sale of a certain lot was terminated by a sale of the property to one with whom the agent had commenced negotiations, this did not defeat the agent's right to his commissions. *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923.

Where, in an action by a real estate broker for compensation for procuring a purchaser, it appeared that a memorandum as to the purchase had been made between the principal and the purchaser, calling for the execution of a completed contract at a specified time and place, evidence was admissible as to what occurred at such time and place, showing that the non-execution of the contract was due to the principal. *Seidman v. Banner*, 99 N. Y. S. 862, 51 Misc. 10.

A broker's right to compensation is not affected by fraudulent representations made to the principal by third persons. *Heaton v. Clarke*, 122 Iowa, 716, 98 N. W. 597. Unless they are in privity with the broker. *Thwing v. Clifford*, 136 Mass. 482.

Where defendant employed plaintiff to sell certain standing timber, and dealt as though he was the owner, he could not defeat the plaintiff's right to commissions on a sale subsequently made to a purchaser found by plaintiff, by showing that at the time plaintiff was employed defendant did not own the land, but procured full title thereto before he sold it to such purchaser. *McDonald v. Cabiness*, 100 Tex. 615, 98 S. W. 943, affirmed 102 S. W. 721.

Subsequent dissatisfaction of the principal with the terms of payment to which she had agreed and on which the broker was authorized to sell the property, or with the terms agreed on with the purchaser found by the broker, if within his authority, does not justify the principal in refusing to complete the transaction. *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Miller v. Barth*, 71 N. Y. S. 989, 35 Misc. 372.

That the principal is ignorant of the efforts of his broker in procuring a customer, does not affect the broker's right to commissions. *Colonial Trust Co. v. Pacific Packing & Nav. Co.*, 158 Fed. 277, 85 C. C. A. 539.

The failure of a prospective purchaser of coal lands to rely upon the owner's representation and the broker employed to find a purchaser that a railway had consented or agreed to construct a branch railroad into such lands, does not defeat the broker's right to his agreed commissions, where, relying upon such representations he found a purchaser, and the sale fails because of their inaccuracy. *Dotson v. Milliken*, 209 U. S. 237, 52 L. Ed. 768. See also Sec. 165.

A broker is not entitled to commissions on sales made by the principal, uninfluenced by the broker. *Humphries & J. v. Smith*, 5 Ga. App. 340, 63 S. E. 248.

Where a broker has procured a purchaser for land, and while his agency is unrevoked, and he is still negotiating with a purchaser at the owner's stipulated price, the owner sells through another broker, the original broker, is, nevertheless, entitled to his commissions. *Hovey v. Aaron*, 113 S. W. 718, 133 Mo. App. 573.

Where brokers procured a purchaser for premises listed with them for sale, who was ready, able and willing to buy the premises at the terms named by the owners, and the purchaser and owners came to an agreement, the brokers were entitled to a commission though the premises were not sold because the owners, before the contract was signed, raised the price, which the purchaser would not pay. *Sotsky v. Ginsberg*, 114 N. Y. S. 114, 120 App. Div. 441. See also Sec. 55.

A party can not defeat his obligation to pay real estate commissions by voluntarily cancelling the contract of purchase and sale obtained by the real estate agent. *Myers v. Buell*, 142 Ill. App. 467.

Where defendants, real estate brokers, agreed to procure a purchaser for plaintiff's property, and in fact procured a person who executed a contract, valid on its face, with plaintiff for an exchange of property, defendants were entitled to their commissions, irrespective of whether the plaintiffs misrepresented their property to the purchaser so as to justify him

in refusing to carry out the exchange. *Lewis v. Mansfield Grain & Elevator Co.* (Tex. Civ. App. '09), 121 S. W. 585.

The fact that the one who was employed to procure a purchaser of real estate violated his contract of employment with a third person engaged in the banking and real estate business did not defeat his right to recover his commissions from the owner on procuring a purchaser. *Pomerici v. Rosenbloom*, 120 N. Y. S. 756.

CHAPTER V.

SECTION.

455. Deals.

456. Excess in price as compensation.

457. Failure of broker to sell.

458. Failure to consummate contract of sale.

SECTION.

459. Failure of sale by defect in title.

460. Failure of purchaser to carry out contract.

461. Failure of consideration.

462. Forfeitures.

Sec. 455. Deals.

Where an owner of real estate asks a real estate broker "to get a deal," it is not necessary for the real estate broker to assent in words; if he procures a purchaser he makes a contract by performance and is entitled to commissions. *Lamb v. Prettyman*, 33 Pa. Super. Ct. 190.

Evidence was held to show that a contract by which plaintiff was employed to procure contemplated exchanges of real estate was a severable contract, and that the carrying out of one of the deals entitled the plaintiff to a commission, without regard to the other prospective deals. *Goodspeed v. Miller*, 98 Minn. 457, 108 N. W. 817. See also Sec. 496. Mechem on Ag. Sec. 634.

Sec. 456. Excess in price as compensation.

A real estate agent employed to sell land for a certain net price is not entitled, in the absence of a contract therefor, to any excess over such price that he may obtain for the land, there being no contract to that effect. *Snow v. McFarlane*, 51 Ill. App. 448; *Turnley v. Michael* (Tex. Civ. App. '91), 15 S. W. 912; *Kellogg v. Keeler*, 27 Ill. App. 244. Compare *Downing Inv. Co. v. Meyer* (Okla. Sup. '07), 91 P. 846.

In an action for the violation of duties due to plaintiff as broker, it appeared that defendant informed plaintiff that he had certain lots for sale at \$17,500; the lots had been placed in defendant's hands by E., another broker, with whom they

had been placed by the owner, and the price asked by defendant was that fixed by the owner; plaintiff refused to buy at that price and offered \$13,000; defendant reported the bid to E., who was informed by the owner that he could have the lots at \$12,000, without commissions; E. then instructed defendant to offer the lots to plaintiff at \$14,000, which offer plaintiff accepted, and defendant then procured a contract, and reported that he had bought the property for plaintiff. *Held*, that the evidence did not show that defendant was employed by plaintiff so as to make him liable for the difference between the price at which the owner was willing to sell and the price asked. *Lazarus v. Sands*, 27 N. Y. S. 885, 33 N. Y. S. 855, 7 Misc. 282, 12 Misc. 575. See also Sec. 25.

Under a contract empowering a real estate broker to sell property for a certain sum, and providing that he should have as commissions all that he could get for the property above the price named, he was entitled to commissions only in the event of procuring a consummation of the sale, and not on procuring the execution of a contract of sale which was never performed. *Munroe v. Taylor*, 191 Mass. 483, 78 N. E. 106.

The owner of land agreed to pay a broker five per cent. commission if he found a purchaser who would pay him \$3,000; thereafter the owner went away, but before leaving told the broker to consult C., and deal with him in the owner's place; subsequently C. authorized a sale for \$3,000 net to the owner, agreeing that the broker might have anything above that; the owner was informed of a sale made for \$3,500, the contract calling for a good title, but refused to execute a proper deed. *Held*, that the broker was entitled to recover \$500. *Foster v. Taylor*, 44 Wash. 313, 27 Pac. 358.

Where a broker agreed with the owner of land to sell it, and that all above a certain price should be divided between them, and advised her to sell below the price named after a certain time, on the ground that the lands were not worth more, and effected a sale after the death of the owner for her executor at a price which left nothing, under the agreement with the decedent, to be divided, a claim against the executor for commissions could not be allowed. *In re French's Est.*, 101 N. Y. S. 734, 51 Misc. 457.

Where an owner promised and agreed to pay a broker as a commission for procuring a tenant, "all you get above \$2,000 per year," and the broker rents the premises for five years at an annual rental of \$2,200, he was entitled to the excess over \$2,000 each year during the life of the lease, and not merely for one year. *Goldstein v. D'Arcy*, 201 Mass. 312, 87 N. E. 584. See also Sec. 212. Compare Sec. 207.

A broker employed to procure a purchaser of real estate, to receive as commissions any sum in excess of \$45 per acre, can not recover commissions, where the owner sold the land at \$45 per acre, in the absence of a showing that the sale was made in fraud of the broker's rights, though he claimed that he could have sold for \$50 per acre. *Cook v. Whiting* (Iowa Sup. '09), 122 N. W. 835.

A broker employed to procure a purchaser willing to pay \$16,000 net, for a commission of whatever was obtained in excess of that sum, who procured a purchaser willing to pay \$16,500, on the condition that the owner pay to a third person as purchaser's agent, for his compensation in the transaction, two and one-half per cent. thereof, did not comply with the contract of employment and could not recover commissions. *Slayback v. Wetzel* (Mo. App. '09), 123 S. W. 982.

Sec. 457. Failure of broker to sell.

Where a broker brought a prospective purchaser before the owner of land, and the prospective purchaser, upon being told the price, left without taking any action, the broker was not entitled to a commission, since he had not furnished a purchaser ready, able and willing to buy on the seller's terms. *Innes v. Bogan*, 41 Colo. 9, 91 P. 1108.

Sec. 458. Failure to consummate contract of sale.

To entitle a real estate broker to his commission he must produce a person who actually purchases the property by complying with the terms agreed upon, unless his failure to do so is caused by the fault of the vendor. *Richards v. Jackson*, 31 Md. 250; *Fox v. Regan*, 240 Ill. 391, 88 N. E. 974; *Briggs v. Rowe*, 1 Abb. Dec. (N. Y.) 189, 4 Keyes, 424; *Burnett v. Eddling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Parker*

v. Nat. Bdg., etc., Assn., 55 W. Va. 134, 46 S. E. 811; *Hugill v. Weekly*, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. N. S. 1262; *Hamberger v. Thomas* (Tex. Civ. App. '09), 118 S. W. 770; *Dotson v. Millikin*, 209 U. S. 237.

Where the owner of land authorized real estate agents to sell land purchased by him, and informed them that he had no deed for the same, but held it under a contract, and the agents made a contract for a sale of the land, but the purchaser refused to complete, because the vendor had only a contract of purchase, there being no other defect in the title, it was held that the agents were not entitled to recover the agreed commissions on the sale, as it proved abortive without any fault on the part of their principal. *Hoyt v. Shipherd*, 70 Ill. 309.

Where a broker was employed to sell a whole tract of land, or a part thereof, and after negotiations the broker failed to make a sale, and an attempt was made to discharge him, but he continued his negotiations, subsequently the owner sold a portion of the tract to a person with whom the broker had prior negotiations; the owner was held liable to pay the broker a proportionate commission. *Diamond v. Wheeler*, 80 N. Y. S. 416, 80 App. Div. 58; *Bogart v. McWilliams* (Tex. Civ. App. '95), 31 S. W. 434.

A broker employed to procure a loan on real estate is not entitled to compensation merely because a lender was found who agreed to make the loan, subject to the conditions, "title, etc., being found ultimately satisfactory," but who declined to make the loan after an examination of defendant's title to the real estate. *Chambers v. Ackley*, 91 N. Y. S. 78; *Gatling v. Central Spar Verein*, 73 N. Y. S. 496, 67 App. D. 50.

An owner employed a broker to procure a purchaser for described real estate for a specified sum at a specified commission; the broker procured a third person to make an offer, which the owner accepted, and the two entered into a contract for an exchange of properties; the broker testified that the owner stated that if he could get a third person to agree to give a specified number of lots and a mortgage back of a specified sum the owner would pay a specified sum for commissions; the agreement for an exchange was not carried out

because of a defect in the title of the third person, which the broker attempted to cure. *Held*, that the broker was not entitled to commissions, none being earned unless a transfer was made. *Keating v. Healey*, 147 Mich. 279, 110 N. W. 943, 13 D. L. N. 1035.

An owner employed a broker to procure a purchaser of his land; the broker procured a purchaser who contracted with the owner for the purchase; the purchaser was unable to pay the cash necessary to consummate the sale, and he depended on a third person with whom he had contracted to buy the property, and who was to furnish the cash to make the first payment; the sale was not made, and the owner cancelled the contract. *Held*, that it was not necessary for the broker, in order to recover his commissions, to prove that the purchaser was able, independently of the third person, to make the cash payment, and if the purchaser could have procured the money from the third person, and if the failure to complete the sale resulted from the fault of the owner, the commission was earned. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627. Compare *Fox v. Demargo Land Co.*, 37 Colo. 203, 86 P. 344; *Harmon v. Enright*, 107 Mo. App. 560, 81 S. W. 1180; *Butler v. Baker*, 17 R. I. 582, 23 A. 1019.

A real estate agent executed, in duplicate, a contract of sale in excess of his authority and delivered one copy to the purchaser, and sent one to the principal with a request that the latter have his wife sign it; the purchaser had no knowledge that there was another copy of the contract, sending at different times to the agent various propositions for a modification of the contract; the principal knew that the purchaser and the agent were in communication, and the former was chargeable with knowledge that the terms of the contract exceeded the agent's authority. *Held*, that the principal's failure to communicate with the purchaser was not a ratification. *Strong v. Ross*, 33 Ind. App. 586, 71 N. E. 918. See also Sec. 618.

Sec. 459. Failure of sale by defect in title.

A contract of employment may be so drawn as to deprive the broker of the right to a commission, if the transaction

should fall through because of a defect in the principal's title. *Louisville, etc., R. Co. v. Shepard*, 126 Ala. 416, 28 S. 202.

Sec. 460. Failure of purchaser to carry out the contract.

If the principal and the customer found by the broker enter into a valid contract, and the purchaser fails to make the deferred payments and surrenders possession to the vendor, the broker is not deprived of his right to a commission for making the sale. *Shainwald v. Cady*, 92 Cal. 83, 28 P. 101; *Halleck v. Hinckley*, 19 Colo. 38, 34 P. 479; *Lester v. Norton*, 43 Conn. 219; *Moss v. Wren* (Tex. Sup. '08), 118 S. W. 149; *Friestedt v. Dietrich*, 84 Ill. App. 604; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Greene v. Hollingshead*, 40 Ill. App. 195; *McConaughy v. Mahannah*, 28 Ill. App. 169; *Love v. Miller*, 53 Ind. 294; *Micks v. Stevenson*, 22 Ind. App. 475, 51 N. E. 492; *Pearson v. Mason*, 120 Mass. 53; *Love v. Owens*, 31 Mo. App. 501; *Lanney v. Healey*, 56 Neb. 313, 76 N. W. 558; *Seabury v. Fidelity, etc., Ins. Co.*, 205 Pa. St. 234, 54 A. 898; *Hipple v. Laird*, 189 Pa. St. 472, 42 A. 46; *Bach v. Emerich*, 35 N. Y. Super. Ct. 548; *Heinrich v. Kern*, 4 Daly (N. Y.), 74; *Thain v. Philbreck*, 74 N. Y. S. 856, 36 Misc. 829; *Rosenberg v. Smith*, 55 N. Y. S. 528, 25 Misc. 774. See also Sec. 449.

Sec. 461. Failure of consideration.

Partial failure of consideration is no defense to an action on a note executed and delivered by the vendee to the broker for a commission for making a sale or exchange of real estate. *Wade v. Bishop*, 5 Ohio Superior & C. Pl. Dec. 625.

Defendant executed two notes for \$385 each in payment of a commission for selling land, and payable only in the event that the vendee of the land remained on it for one year and made improvements equal in value to the notes; the vendees plowed one hundred acres, which increased its value \$2.50 per acre, erected buildings, constructed drainage worth \$75, and a levee worth \$64, but with the consent of defendant, to whom they executed a reconveyance, abandoned the premises before the expiration of a year. *Held*, that a finding that there was no failure of consideration for the note was proper. *Easton*

Packing Co. v. Kennedy, 131 Cal. 23, 63 P. 130; *Webster v. Holmes*, 174 Mass. 410, 54 N. E. 872.

Sec. 462. Forfeitures.

The plaintiff, a real estate broker, having in his hands certain property of the defendant for sale or exchange, arranged for an exchange with C., and a contract was executed by C. and the defendant, by which each was to take immediate possession of the other's property, and on or before a day fixed was to convey his property to the other by warranty deed; and if either should fail to perform, he was to pay the other \$500 as liquidated damages; C. failed to perform, without fault on the part of the defendant. *Held*, that the plaintiff was entitled to his commissions; the defendant having agreed to accept \$500 in lieu of performance, would not be allowed to deny as against the plaintiff that that payment was equivalent to performance. *Leete v. Norton*, 43 Conn. 219; criticized, *Rieger v. Bigger*, 29 Mo. App. 421; *Parker v. Estabrook*, 68 N. H. 349, 44 A. 484. *Contra*, *Kimberly v. Henderson*, 29 Md. 512.

H., a real estate broker, having heard that K. desired to sell certain property, went to his office and informed him that in case he succeeded in negotiating a sale he should expect the usual commissions; afterward H. brought K. and J. together and certain papers were executed whereby they contracted for a sale of the property, with a stipulation that if either party should fail to comply with the contract, a forfeiture of \$1,000 should be paid by the party in default; J. failed to comply with the contract and gave his note for the forfeit money. *Held*, that H. was not entitled to a commission. *Kimberly v. Henderson*, 29 Md. 512. *Contra*, *Leete v. Horton*, 43 Conn. 219; *Parker v. Estabrook*, 68 N. H. 349, 44 A. 484.

A broker is not injured by the cancellation, without his consent, of a contract of purchase, and derived from it no cause of action against the vendor, where the broker had agreed with the vendor that he (the broker) should not be entitled to a commission until the purchaser fully completed the transaction; the agreed payment was made and a contract of sale executed, but the purchaser defaulted in making the first de-

ferred payment, as a result of which the vendor became entitled, under the contract of purchase, to declare a forfeiture. *Seymour v. St. Luke's Hospital*, 50 N. Y. S. 989, 28 A. D. 119.

Where a purchaser agrees absolutely to buy the property, the broker can not be deprived of the commission because the price is payable in installments where the vendor has the right to declare a forfeiture on default of payment of any installment, exercises the same and retains the payments made. *Stewart v. Fowler*, 53 Kan. 537, 36 P. 1002; *Willes v. Smith*, 77 Wis. 81, 45 N. W. 666; *Betz v. Williams, etc., Land Co.*, 46 Kan. 45, 26 P. 456.

A broker may, by agreement, forfeit his right to a commission in case a purchaser defaults in carrying out his contract. *Seymour v. St. Luke's Hospital*, 50 N. Y. S. 989, 28 App. Div. 119. Where a customer obtained by a broker refuses to carry out the contract of sale entered into with the vendor, the broker does not forfeit his right to a commission by the fact that, on such refusal, he procures another customer and states to his principal that he expects no commission on the previous sale. *Beach v. Emerich*, 35 N. Y. Super. Ct. 548.

Where a contract for the purchase of land accorded to the purchaser the right to "back out," on paying a forfeiture, the vendor can not recover damages from the agents on account of their having, by false representations, induced the purchasers to forfeit the contract. *Hetzler v. Morrell*, 82 Iowa, 562, 48 N. W. 938.

If an agent or broker employed to transact a particular business is guilty of bad faith to his principal, he thereby forfeits his right to commissions. *Bunn v. Kerch*, 214 Ill. 259, 73 N. E. 419. The right of one employing a broker to procure a purchaser for his land to recover from the broker the forfeit money paid by the intending purchaser failing to complete the purchase is not affected by a custom that forfeit money belongs to the broker, the owner not contracting with reference thereto. *M. L. Chambers & Co. v. Herring* (Tex. Civ. App. '05), 88 S. W. 371.

An agent employed by A. and B. to purchase land, made a purchase and took a conveyance to himself, and afterwards

obtained from A. his interest in the land. *Held*, that B. did not, by neglecting to pay his share of the purchase money at the stipulated time, forfeit his right to a conveyance from the agent. *Hutchinson v. Hutchinson*, 4 Desau. (S. C.) 77. Compare *First Bank v. Bissell*, 2 McCrary (U. S.), 73. Compare Sec. 368.

CHAPTER VI.

SECTION.

- 463. Financial conditions.
- 464. Financial responsibility of purchaser.
- 465. Finding a purchaser.
- 466. Gratuities.
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- 469. Broker entitled to commissions though sale enjoined.
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- 471. Broker not informing principal of customer defeats commissions.
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SECTION.

- 474a. Broker employed to sell real estate not required to prepare contract of purchase.
- 475. Broker as middleman may recover commissions from each.
- 476. Sale of mine, not within description, defeats commissions.
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- 478. Modification in broker's presence did not affect.
- 479. Modification by performing other services modifies right to commissions.
- 480. Broker agreeing to take stock, can not recover in money.
- 481. Net price to owner, broker does not take excess.
- 482. Net price to owner, broker selling thereat not entitled to any commissions.

Sec. 463. Financial conditions.

The fact that the principal cures the defect in his title, does not deprive the broker of his right to a commission, where the principal gave no notice that the defect was cured until six months after the customer was procured, at which time the customer refused to make the loan because of changed financial conditions. *Clark v. Henry G. Thompson, etc., Co.*, 75 Conn. 161, 52 A. 720.

Sec. 464. Financial responsibility of purchaser.

Where the proposed purchaser was, at the time of the signing of the contract of sale, ready to make the payment then due, the broker is not required to show that the purchaser had sufficient funds on hand at that time to make the final payment. *Levy v. Ruff*, 23 N. Y. S. 1002, 2 Misc. 180; *McDermott v. Mahoney* (Iowa Sup.) 106 N. W. 925, affirmed on rehearing, 115 N. W. 32.

The fact that a purchaser is insolvent does not defeat the broker's right to a commission, where a cash payment is not required, and the contract of sale contemplates that the vendor is to be secured by a bond and deed of trust, which the purchaser is prepared to deliver. *Ross v. Fickling*, 11 App. Cas. (D. C.) 442.

Where the proposed purchaser admits that he had not the ability to pay the price fixed, his testimony that he was acting in behalf of a syndicate, and that he would have been prepared when the time for payment came, to find the money required, does not show his ability to buy. *Harmon v. Enright*, 107 Mo. App. 560, 81 S. W. 1180; *Butler v. Baker*, 17 R. I. 582, 23 A. 1019; *Fox v. Demargo Land Co.*, 37 Colo. 203, 86 P. 344. Compare *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627.

Where a broker, under a general contract of employment to sell real estate, obtained a purchaser satisfactory to his principal, who made an enforceable contract of sale, without being induced to do so by any representations of the broker as to the purchaser's responsibility, and without any bad faith on the broker's part, the latter was entitled to commissions, though, without the principal's fault, the vendee failed to perform the contract, solely because of the lack of sufficient financial responsibility at the time the contract was executed. *Alt v. Doshier*, 92 N. Y. S. 439, 102 App. Div. 344, affirmed 186 N. Y. 566, 79 N. E. 1100; *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974; *Glade v. Eastern Ill. Min. Co.*, 129 Mo. App. 443, 107 S. W. 1002; *Brand v. Nagle*, 107 N. Y. S. 156, 122 App. Div. 490. Compare *Dotson v. Millikin*, 27 App. Cas. (D. C.) 500. See also Sec. 192.

The broker must show that the purchaser is able to make

the exchange, and this ability is not proved by the mere production of deeds on his part, without some showing that he also had title to the properties he was willing to deed. His ability does not depend upon general financial standing, but upon his being the owner of the land it was proposed to exchange. *Herscher v. Wells*, 103 Ill. App. 418.

Where a principal accepts a purchaser found by his broker, without questioning his ability to perform, and the sale fails of consummation by the principal's own fault or failure to make good his offer, the burden is on him, in order to defeat the broker's right to compensation, to show the purchaser's want of financial ability. *Dotson v. Milliken*, 27 App. (D. C.) 500. Compare *Alt v. Doscher*, 92 N. Y. S. 439, 102 App. Div. 344; *Glade v. Eastern Ill. Min. Co.*, 129 Mo. App. 443; *Brand v. Nagle*, 107 N. Y. S. 156, 122 App. Div. 490. See also Secs. 192, 499.

In an action for a broker's commissions, evidence concerning arrangements made by the purchaser procured for funds with which to complete the purchase, and the financial ability of the concern from which funds were to be secured was admissible. *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664; *Czarnowski v. Holland*, 5 Ari. 119, 78 P. 890; *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627; *Fox v. Demargo Land Co.*, 37 Colo. 203, 86 P. 344.

Where a vendor of land is not influenced by misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground for refusing to pay the broker's commissions. *Irwin v. Mowbray*, 5 N. Y. S. 430.

A broker obtained a customer who contracted for the purchase of the property. Before the time fixed for performance the purchaser failed to obtain an extension of time asked for, because of his inability to procure funds. The purchaser, on ascertaining that the broker did not have the deed in his possession on the day fixed for performance, tendered the price and demanded the deed. The purchaser induced a bank to make the tender, with the understanding that the identical money would be returned. The tender was made by the bank's clerks. The purchaser, on being subsequently given an op-

portunity to purchase on the same terms refused to do so, though the property was worth more than the agreed price. *Held*, to show, as a matter of law, that the purchaser was not able and ready to comply with the terms of his agreement, defeating a recovery by the broker of his commissions. *Little v. Herzinger*, 34 Utah, 337, 97 P. 639.

It was not necessary, in order to entitle a real estate broker to commissions for land sold, that the purchaser should be able to perform at the time the contract was signed, but only at the time fixed for passing title. *Joffe v. Nagel*, 114 N. Y. S. 905.

A broker employed to procure a purchaser of real estate, who procures a purchaser capable and willing to contract to purchase, and who does not warrant the financial ability of the purchaser, and who is not guilty of any fraud, earns his commissions on the vendor and purchaser entering into a binding contract of sale and purchase, though a sale is not consummated because of the failure of the purchaser to perform, for the vendor takes the responsibility of accepting the proposed purchaser, and, in the absence of contract, the broker need not see that the purchase money is paid, nor enforce the contract of sale. *Moore v. Irvin*, 89 Ark. 289, 116 S. W. 662.

After a broker had negotiated a sale of land, and the prospective purchaser had been unable to obtain a loan with which to make the first payment, the owner's agent and the purchaser declared the deal off. Subsequently the agent gave the broker an extension of time in which to procure the loan of \$7,000, to be secured by mortgage on the land, but he was able only to obtain a conditional verbal promise from one person to advance \$6,500, secured by mortgage on the land, and an indefinite arrangement with a banker to lend \$500 on personal security, on the usual terms of bank loans. *Held*, that he had failed to comply with the terms of the extension, and the agent and purchaser were justified in refusing to proceed further, even if the purchaser was bound by the agent's assent to the extension of time. *Jones v. Buck* (Iowa Sup. '09), 120 N. W. 112.

Where a broker employed to sell property on specified terms to designated persons, effects a sale to them on such terms, he

need not, in an action for his commissions, show that they were able to make the purchase. *Stoutenburg v. Evans* (Iowa Sup. '09), 120 N. W. 59.

A real estate broker need not show, in order to recover commissions, that he produced a purchaser with legal tender in hand, but only that the purchaser was ready, willing and pecuniarily able to pay for the property within the time fixed, and it is sufficient if the purchaser has arranged so that the money will be available for payment when the deed is delivered, though part of it is obtained from a mortgage on the purchased property executed contemporaneously with the deed to the purchaser. *McCabe v. Jones* (Wis. Sup. '10), 124 N. W. 486.

Where an offer to exchange certain property contained an agreement binding defendant to pay plaintiff a commission of two and one-half per cent. of the value of defendant's property, in the event the deal was closed, plaintiff's right to such amount, on defendant's subsequent refusal to complete the exchange, did not depend on the fact that the acceptance of the offer by the other party was conditional on the property agreeing with a description contained in the offer, but solely on the readiness and ability of the other party to complete the exchange. *Hegel v. Hessell* (Wash. Sup. '10), 107 P. 375.

Sec. 465. Finding a purchaser.

In the absence of a special contract a broker was not entitled to a commission on merely bringing a purchaser who was ready, willing and able to pay the price demanded, where no sale was made because of a disagreement as to when the transfer should take place. *Haase v. Schneider*, 98 N. Y. S. 587, 112 App. Div. 336. See also Sec. 541.

In an action for services in selling an estate for defendant, where he did not know till after the sale that plaintiff had done anything to aid it, circumstances held to warrant a decision that there was evidence for the jury of a continuing offer, of an acceptance, and of performance by the plaintiff of the contract to obtain a purchaser. *Barnstein v. Laus*, 104 Mass. 214; *Storer v. Markley*, 164 Ind. 535, 73 N. E. 1081.

A broker is entitled to his commission when he has found

a purchaser or a lender, as the case may be, ready, able and willing to purchase the property or to lend the money, in accordance with the terms proposed by the principal. *Eggland v. South* (S. D. Sup. '08), 118 N. W. 719; *Beckley v. Newton*, 140 Ill. App. 301; *Munson v. Carlstrom* (Iowa Sup. '09), 119 N. W. 606; *Mutchnick v. Davis*, 114 N. Y. S. 997; *Little v. Herzinger*, 34 Utah, 337, 97 P. 639; *Caruthers v. Reeser*, 134 Ill. App. 370; *Masterson v. Knight*, 135 Ill. App. 548; *Glover v. Duffy*, 112 N. Y. S. 1099; *Hutto v. Strigh*, 157 Ala. 566, 47 So. 1031; *Peach River Lumber Co. v. Montgomery*, (Tex. Civ. App. '08), 115 S. W. 87; *Sotsky v. Ginsberg*, 114 N. Y. S. 114; *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381. And in case of a sale, when the broker has procured an enforceable contract of sale upon the principal's terms. *Moss & Raley v. Wren* (Tex. Sup. '08), 113 S. W. 739.

Sec. 466. Gratuities.

Without an express contract providing therefor, a broker is not entitled to a commission for rendering a service for which, by the local custom, no charge is made. *Conrey v. Hoover*, 10 La. Ann. 437.

It was proper to instruct the jury that defendants were liable for the value of plaintiff's services, if they were of such a character and rendered under such circumstances as would indicate to a reasonably intelligent business man, that they were not performed gratuitously, and that compensation was expected, the instruction not assuming that plaintiff had rendered all the services for which he asked compensation. *Miller v. Early*, 22 Ky. L. R. 825, 58 S. W. 789. Whether a broker's services were rendered with expectation of reward is a question for the jury. *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116; *Darling v. Howe*, 14 N. Y. S. 561, 60 Hun, 578. Where an agent informed his principal that he should charge no commissions for his services, he was held to be precluded from charging commissions during the life of the principal, though the principal had recognized the agent's right to commissions. *Higginson v. Fabre*, 3 Desau. (S. C.) 89. Voluntary services by a broker are mere gratuities. See *Mechem on Ag.* Sec. 600.

Sec. 467. Goods exchanged for land.

Defendant agreed to pay plaintiff a commission for finding a purchaser with whom he could exchange his stock of goods for land, and the plaintiff secured a contract with P. to exchange a certain tract of land for defendant's stock of goods, but, by a mistake of P., the land described in the contract was not owned by him; it did not appear that defendant was aware of the mistake. *Held*, that plaintiff was not entitled to a commission. *Snyder v. Fidler*, 135 Iowa, 304, 112 N. W. 546.

Sec. 468. Broker entitled to commission in stock of insurance company

A broker was employed to procure a purchaser of a farm for an agreed commission; he found a purchaser who purchased the farm and paid for it in the stock of an insurance company; the owner agreed to transfer to the broker shares of such stock, but failed to do so. *Held*, that the broker was entitled to recover the agreed commission. *Rider v. Pell*, 51 N. Y. 669. See also Sec. 377.

Sec. 469. Broker entitled to commissions where sale was enjoined.

An agent who, under a contract, produced a person able and willing to purchase real estate is entitled to his commissions, although the sale is afterwards enjoined. *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922. See also Sec. 473.

Sec. 470. When broker is not entitled to full commission until price paid.

Where the purchase money of a mine was payable in installments, and the broker's commissions were to be deducted from each installment as paid, it is error to render judgment for the full amount of commissions before all the installments have been paid. *Gorham v. Heiman*, 90 Cal. 346, 27 P. 289; *Coate v. Locust Pt. Co.*, 102 Md. 291, 162 A. 625. See also Secs. 297, 570.

Sec. 471. Broker not informing principal of customer defeats commissions.

A real estate agent who fails to induce a customer to pay the price of land demanded by the owner, but predicts that

he will ultimately pay the price, is not entitled to commissions where the owner afterwards sells the lands to others for such price, without knowing that it was actually purchased for the customer, the court holding that the broker was not the procuring cause of the sale. *Goldstein v. Walters*, 7 N. Y. S. 756, 8 N. Y. S. 957, 15 Daly, 397. See also Secs. 235, 312, 431.

Sec. 472. Knowledge by broker that principal owns but part of the property offered, does not defeat his commissions.

A broker's right to commissions for procuring a purchaser for land under an agreement therefor, is not affected by the fact that he knew the principal had title to only five-sixths of the land. *Martin v. Ede*, 103 Cal. 157, 37 P. 199.

Sec. 473. Litigation instituted by third persons does not defeat the broker's right to commissions.

A broker is entitled to commissions where a purchaser was obtained through his agency, the agreement for sale and purchase being complete, and only prevented from consummation by litigation instituted by third persons. *Moore's Est.*, 9 Pa. Dist. R. 675. See also Sec. 469.

Sec. 474. Methods of earning commissions by broker.

There are at least three different methods of earning commissions under an agency for the sale of real estate (1) by effecting a binding contract of sale, under authority given to the agent to make a contract for the principal; (2) by producing a purchaser to whom a sale is in fact made, and (3) by producing a purchaser ready, willing and able to buy on the terms specified in the agency agreement. *McDermott v. Mahoney*, 139 Iowa, 292, 115 N. W. 32

Sec. 474a. A broker employed to sell real estate is not required to prepare a contract of purchase.

A broker employed to sell real estate is not required to prepare a contract of purchase. *Brackenridge v. Claridge*, 42 S. W. 1005, 91 Tex. 527.

Sec. 475. Broker who merely brings the parties together is a middleman, and may recover from each.

If the broker merely brings together two parties who desire to exchange or sell their lands, and his employment then ends, and the parties themselves settle the terms of the transaction, he is a mere middleman, and may recover from each party, if each has agreed to pay him. *Clark v. Allen*, 125 Cal. 276, 57 P. 985; *Green v. Robertson*, 64 Cal. 75; *Manders v. Croft*, 3 Colo. App. 236, 32 P. 836; *Cox v. Haun*, 127 Ind. 325, 26 N. E. 822; *Muller v. Kutzleb*, 7 Bush. (Ky.) 253; *Dolph v. Wain-scott*, 14 Ky. L. R. (abst.) 304; *Montrose v. Eddy*, 94 Mich. 100, 53 N. W. 916; *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276; *Child v. Ptomey*, 17 Mont. 502, 43 P. 714; *Norton v. Genesee Nat. Sav., etc., Ass'n*, 68 N. Y. S. 32, 57 A. D. 520; *Knaus v. Gottfried Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867; *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Pollatschick v. Goodwin*, 40 N. Y. S. 682, 17 Misc. 587, 75 St. 86; *Bonwell v. Auld*, 29 N. Y. S. 15, 9 Misc. 65; *Jarvis v. Schaefer*, 105 N. Y. 289, 11 N. E. 634; *Bolheimer v. Richardt*, 55 How. Pr. (N. Y.) 414; *Haviland v. Price*, 26 N. Y. S. 757, 6 Misc. 372; *Collins v. Fowler*, 8 Mo. App. 588; *Orton v. Schofield*, 61 Wis. 382; *McClure v. Luke*, 154 Fed. 647; *Bass v. Talbert* (Tex. Civ. App. '08), 112 S. W. 1077; *Ross v. Carr* (N. M. Sup. '09), 103 P. 307; *Grasinger v. Lucas* (S. D. Sup. '09), 123 N. W. 77; *Sternberger v. Young* (N. J. Eq. '10), 75 A. 807.

Quaere? Whether one who acts as middleman, merely bringing the vendor and vendee together to make their own contract, without aid, advice to or interference on behalf of, either, may recover compensation from both, without knowledge by one of such arrangement with the other. *Harten v. Loeffler*, 31 App. D. C. 362. Compare Sec. 578.

Sec. 476. Sale of mine by broker, not within description, not entitled to commissions.

An agreement providing that defendant should pay the plaintiff a certain commission on any sale made through him, or to pay the same percentage "on any sale made through a certain bond or agreement made with Robert Hennegan of this city, on certain mining property in said agreement in Ures

District, State of Sonora, Mexico," does not provide for commissions on a sale made through plaintiff of mines situated in the District of Arispe. *Wulff v. Lindsay*, 8 Ariz. 168, 71 P. 963. See also Secs. 59, 181.

Sec. 477. Modification of contract, not assented to by broker, does not affect commissions.

Defendant's agreement to pay plaintiff a certain amount for furnishing a purchaser for land is not revoked by defendant's statement to plaintiff, after furnishing the name of one who afterwards became a purchaser, that he would pay no commission to any agent on a sale of the land unless a certain price was obtained, the plaintiff not having assented to the modification. *Burd v. Webster*, 128 Wis. 118, 107 N. W. 23; *Odell v. Dozier*, 104 Ga. 203, 30 S. E. 813; *Levistone v. Landreux*, 6 La. Ann. 26; *Glade v. Eastern Ill. Min. Co.*, 129 Mo. App. 443, 107 S. W. 1002; *Cody v. Dempsey*, 83 N. Y. S. 899, 86 App. Div. 335; *Mottos v. Engle*, 15 S. D. 330, 89 N. W. 651; *Mark v. Elliott*, 90 N. Y. S. 331; *Blair v. Slosson*, 27 Tex. Civ. App. 403, 66 S. W. 112; *Bishop v. Averill*, 17 Wash. 209, 49 P. 237, 50 P. 1024.

Sec. 478. Modification of contract by owner in broker's presence, did not affect commissions.

The fact that the terms of a sale of realty, as stated to the broker, were modified by the owners as to the commissions, in the broker's presence, and the purchaser's proposal as to the method of payment, would not relieve the owner from liability for commissions. *Huntmer v. Arent*, 16 S. D. 465, 93 N. W. 653.

Sec. 479. Modification of contract by broker performing other services, modifies right to commissions.

Where a broker's duty is not merely to procure a purchaser, but to perform some other agreed services, within a reasonable time or within a limited time, the general rule as to what is required of him to be entitled to his commissions is modified accordingly. *Phinzy v. Bush*, 129 Ga. 479, 59 S. E. 259.

Sec. 480. Broker agreeing to accept corporate stock for commissions, not entitled to recover in money.

Where, by the contract in regard to a sale of property, a broker arranges with all the parties that the compensation shall be paid in certain stock of a company to be formed by him and others to buy the land, he can not hold the vendors responsible for the amount of such compensation. *Bowles v. Allen* (Va. Sup.), 21 S. E. 665. Compare Sec. 468.

Sec. 481. Net price to owner, does not entitle broker to excess.

A real estate broker to sell land for a certain net price is not entitled, in the absence of a contract therefor, to the excess over such price that he may obtain for the land. *Snow v. McFarlane*, 51 Ill. App. 448; *Turnley v. Michael* (Tex. Civ. App. '91), 15 S. W. 912. Compare *Deming Inv. Co. v. Meyer* (Okla. '07), 91 P. 846.

And where a broker was authorized to sell land for \$3 per acre net to the owner, and was offered \$3.50 by a purchaser, who subsequently bought the land of the owner, without the broker's intermediation, the broker could not recover fifty cents per acre from the purchaser, but his action was against the owner, as it was his duty to sell for the best price obtainable, and account to the owner therefor, less a reasonable compensation. *Boysen v. Robertson*, 70 Ark. 56, 68 S. W. 243.

Sec. 482. Net price to owner, broker selling thereat not entitled to any commission.

A broker was orally employed to procure a purchaser of a farm within five days, at a price which should net the owner \$11,000 and the broker \$875; thereafter the broker stated in writing that any arrangement made by his agent and the owner would be satisfactory; that he would have persons look at the farm before the expiration of the five days, and that any arrangement should be made in writing; the owner wrote that he would give the broker "a price of \$11,000 on" the farm for ten days, "reserving the privilege to sell to others;" the broker sent his agent to the owner, with a writing, for the purpose of making sure of a commission if the sale was made.

Held, that the written contract agreed to by the broker, and the owner's written statement, which superseded the oral contract, conferred on the broker the right to sell the farm at a sum which would give the owner \$11,000, and on the owner the right to sell it to any purchaser not procured by the broker, and authorized a sale to a purchaser procured by the broker for as low a price as \$11,000, if the broker's agent in charge of the transaction was willing to do it, unless the owner knew that the agent was acting contrary to his instructions. *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21; *Babcock v. Merritt*, 1 Colo. App. 84, 27 P. 882; *Rees v. Spruance*, 45 Ill. 308; *Burnett v. Betts*, 236 Ill. 499, 86 N. E. 258; *Sanger v. Wilson*, 52 Ill. App. 117; *Antisdell v. Canfield*, 119 Mich. 229, 77 N. W. 944; *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227; *Holcomb v. Stafford*, 102 Minn. 233, 113 N. W. 449; *Beatty v. Russell*, 41 Neb. 321, 59 N. W. 919; *Holbrook v. Inv. Co.*, 30 Ore. 259, 47 P. 920; *Ames v. Lamont*, 107 Wis. 531, 83 N. W. 780; *Wolverton v. Tuttle*, 51 Ore. 501, 94 P. 961. See also Sec. 560.

In some jurisdictions, in such case the broker is, nevertheless, entitled to recover of the owner a reasonable compensation for his services. *Alexander v. Breedon*, 14 B. Mon. (Ky.) 125; *Aikin v. Allan*, 14 Manitoba, 549; *Ford v. Brown*, 120 Cal. 551, 52 P. 817. But can not recover where the sale is not completed. *Seattle Land Co. v. Day*, 2 Wash. 451, 27 P. 74.

An agreement for the sale of real estate for a net amount to the owners, the person making the sale to have as compensation what he could get above that amount, entitled him to no compensation for making a sale until the owners received the net amount stipulated, unless a failure to do so was due to their own fault. *Burnett v. Botts*, 236 Ill. 499, 86 N. E. 258.

CHAPTER VII.

SECTION.

- 483. Net price to owner and note for excess to broker—On vendor's refusal broker entitled to commission.
- 484. Net price, broker entitled to excess from first payment made.
- 485. Where owner changed contract from gross to net price liable to broker for commissions.
- 486. Broker's commissions computed on actual sum received.
- 487. Failing to disclose that nominal is not the real purchaser does not defeat broker's commissions.
- 487a. Liability to broker for commission depends upon real parties to bargain.
- 488. Broker entitled to commissions where non-performance of contract not occasioned by his fault.
- 489. Where neither principal nor broker effecting sale had notice of other broker's negotiations he is not entitled to commissions.
- 490. Principal selling before expiration of time given broker without notice, broker entitled to commissions.
- 491. Reporting offer of \$16,000 instead of \$15,000 did not deprive broker of commissions.

SECTION.

- 492. Oral contract to sell land followed by written contract entitled broker to commissions.
- 493. Broker entitled to commissions for sale of four houses, not entitled to proportionate amount for one.
- 494. Broker entitled to commissions for sale of lots, not entitled to same rate for large body of land.
- 495. Broker promised commissions for selling part, entitled to the same rate for selling all.
- 496. Broker who failed to sell all entitled to commissions on sale of part by owner to customer.
- 497. Share of profits' on sale through sub-agent not defeated by unfair dealing of latter.
- 498. Commissions payable on sale, and not on collection of deferred payments.
- 499. Commissions are due when contract is made with purchaser produced by broker.
- 499a. Broker's commissions are earned when contract of exchange is executed.
- 499b. Commissions not due until actual transfer made.

Sec. 483. Net price to owner and note for excess to broker, on vendor's refusal broker entitled to commissions.

Defendant employed plaintiff to effect a sale of his land so as to yield \$2,500, plaintiff to receive as compensation all she could obtain above that sum; she procured a purchaser for \$2,880, \$2,500 to be paid to defendant in cash, and plaintiff to receive the purchaser's notes, secured by mortgage, for the balance; defendant refused to convey. *Held*, that he was liable to plaintiff for her loss. *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313; *Foster v. Taylor*, 44 Wash. 313, 87 P. 358; *Van Gorder v. Sherman*, 81 Iowa, 403, 46 N. W. 1087; *Luhn v. Fordtran* (Tex. C. A. '08), 115 S. W. 667.

Sec. 484. Net price, broker entitled to excess from first payment made.

Where a land-owner employed a broker to sell land on an understanding that he should have as his commissions anything that could be obtained over a specified price, the broker was entitled to his commissions out of the first payment made by the purchaser. *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228.

Sec. 485. Where the owner changed the contract from gross to net price liable to broker for commissions.

Plaintiff procured a contract authorizing him to sell defendant's timber land on a five per cent. commission, and, having found a purchaser, presented to defendant for his signature an option giving the grantee the right to purchase in sixty days; defendant, before signing the option, but without any conversation with, the plaintiff, changed the same so as to read that the price was "net cash" to him. *Held*, that such alteration meant that the price was net cash to defendant, as between him and the purchaser, and had no reference to defendant's contract with plaintiff for commissions. *Love v. Scatterd*, 146 Fed. 1, 77 C. C. A. 1.

Sec. 486. Broker's commissions computed on actual amount received.

An agent who agreed to sell a farm for two per cent. on a certain amount, and three per cent. on all received in excess

of that amount, is not entitled to commissions on the value of part of a crop which he knew belonged to another, and which was deducted from the gross amount received. *Barrett v. Johnson*, 64 Pa. St. 223; *Oliver v. Little* (Nev. Sup. '09), 103 P. 240; *Weeks v. Smith* (N. J. Sup. '10), 75 A. 773; *Blakeley v. Pursell*, 90 N. Y. S. 337.

Sec. 487. Failing to disclose that nominal is not the real purchaser does not defeat the broker's commissions.

A mere failure to disclose to the principal that the nominal purchaser is not the real purchaser does not amount to a fraud to deprive the broker of commissions. *Veasey v. Carson*, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241. See also Sec. 525.

Sec. 487a. Liability to broker for commissions depends upon the real parties to the bargain.

Liability to a broker for commissions is not dependent upon what parties formally entered into the written contract of sale offered to, or negotiated in by, the principal, but wholly upon who constituted the "real" parties to the bargain. *McLaughlin v. Campbell* (N. J. Err. & App. '09), 74 A. 530. See also Sec. 317.

Sec. 488. Broker entitled to commissions where non-performance of contract not occasioned by his fault.

A broker is entitled to a commission where the customer found by him and the principal enter into an enforceable contract of purchase or sale, although one or both of the parties refuse to comply with the contract, and the failure is not attributable to the fault of the broker. *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *Bach v. Emrich*, 35 N. Y. Super. Ct. 548; *Folinsbee v. Sawyer*, 36 N. Y. S. 405, 15 Misc. 293; *Brown v. Helmuth*, 21 N. Y. S. 615, 2 Misc. 566; *Donohue v. Flanagan*, 9 N. Y. S. 273, 28 N. Y. S. 757; *Larson v. Burroughs*, 116 N. Y. S. 358.

Sec. 489. Where neither principal nor broker effecting sale had notice of other broker's negotiations he is not entitled to commissions.

Where neither the principal nor the broker effecting the sale had notice of former negotiations with the other broker the

latter is not entitled to a commission, especially where she failed to bring the buyer and seller to an agreement. *Haines v. Barney*, 67 N. Y. S. 164, 33 Misc. 748; *Martin v. Billings*, 2 N. Y. City Ct. 86; *Kifer v. Yoder*, 198 Pa. St. 308, 47 A. 974; *Glasscock v. Vanfleet*, 100 Tenn. 603, 46 S. W. 449. See also Sec. 360.

There are cases holding that, irrespective of notice, the commission belongs to the broker who is the procuring cause of the sale. *Scott v. Lloyd*, 17 Colo. 401, 35 P. 733, and Sec. 446.

Sec. 490. Principal selling before expiration of time given broker, without notice, broker entitled to commissions.

A broker is entitled to commissions where the principal sells before the expiration of the agency, without giving the broker notice of the sale. *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186. (This is contrary to the doctrine that a sale puts an end to the agency, and if his contract has been violated the broker has a right of action for the breach.)

Sec. 491. Reporting offer of \$16,000 instead of \$15,000 did not deprive broker of commission.

The fact that a broker reports to his principal that an offer of \$16,000 for the land has been made instead of \$15,000, does not affect his right to a commission where, as a result of his negotiations, a sale for the smaller sum was made. *Peckham v. Ashhurst*, 18 R. I. 376, 28 A. 357. See also Secs. 215, 502.

Sec. 492. Oral contract to sell land, followed by written contract, entitles the broker to commissions.

Rev. Stat. 1899, Sec. 3418, provides that no contract for the sale of lands made by an agent shall be binding on the principal unless the agent is authorized in writing to make the contract. *Held*, that where a land-owner orally employed a broker to find a purchaser, and the broker made a written contract with the purchaser, the production thereof to the land-owner was equivalent to the production of a purchaser; since, if the owner had chosen to ratify the contract, it would have been binding. *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228.

Sec. 493. Broker entitled to commissions for sale of four houses, not entitled to proportionate amount for one.

Where a broker is entitled to a commission of one-third of the excess above a certain amount realized on a sale of four houses, he is not entitled to a proportionate amount on the sale of only one house. *Meyer v. Haaren*, 5 N. Y. S. 436, 57 N. Y. Super. Ct. 574. Compare Sec. 495.

Sec. 494. Broker entitled to commissions for a sale of lots, not entitled to same rate for a large body of the land.

A contract to pay a certain commission on a sale of lots at a fixed price out of a body of land, does not entitle the agent to a commission at the same rate for a large body of the land. *Louisville Bdg. Ass'n v. Hegan*, 20 Ky. L. R. 1629, 49 S. W. 796.

Sec. 495. Broker promised commissions for selling part, entitled to the same rate for selling all.

Where defendant agreed to pay plaintiff for his services one-half of the proceeds of the sale of two mining claims, but in the sale of these, with others, the interests are not separately valued, the plaintiff is entitled to recover one-half of the entire proceeds of the sale, if it is impossible to determine what proportion should be credited to the claims in which he is interested. *Huff v. Hardwick*, 19 Colo. App. 416, 75 P. 593. Compare Sec. 493.

Sec. 496. Broker who failed to sell all, entitled to commissions on sale of part by owner to his customer.

Where a broker was employed to sell a whole tract of land, or a part thereof, and after negotiating the broker failed to make a sale and an attempt was made to discharge him; but he continued his negotiations, and subsequently the owner sold a portion of the tract to a person with whom the broker had prior negotiations, the owner was held liable to pay the broker a proportionate commission. *Diamond v. Wheeler*, 80 N. Y. S. 416, 80 App. Div. 58. See to contrary *Carpenter v. Atlas Imp. Co.*, 108 N. Y. S. 547, 123 App. Div. 706. See also Secs. 455, 967.

Sec. 497. Share of profits on sale through sub-agent not defeated by unfair dealing of latter.

Where plaintiff, who was the sales agent for certain property, authorized defendant to sell the same, and agreed to divide the profits with him, any unfair dealing on defendant's part with plaintiff's principal, not affecting the sale, did not affect the plaintiff's right, as against defendant, to share in the profits of the sale, in the absence of participancy by plaintiff in defendant's wrong. *Madler v. Pozorski*, 124 Wis. 477, 102 N. W. 892. See also Sec. 520. Compare Sec. 522

Sec. 498. Commissions payable on sale, and not on collection of deferred payments.

Where a vendor instructed his agent that he would take \$15 per acre for his part of the land, and accepted the terms of a sale for part cash and part in deferred payments, with security, the agent's compensation is due when the sale is completed, and not on collection of the deferred payments. *Hancock v. Dodge*, 85 Miss. 728, 37 S. 711; *Wallace v. Shepard*, 42 Texas Civ. App. 594, 94 S. W. 151.

Sec. 499. Commissions are due when contract is made with purchaser produced by broker.

Real estate commissions become due and payable when the broker has produced a purchaser with whom the owner entered into a valid and enforceable contract. *Dennis v. Walters*, 123 Ill. App. 93.

Where a broker has procured a purchaser acceptable to the seller, and an enforceable written contract is made between them, the broker's right to commissions is not dependent on the purchaser's ability to pay for the land. *Hamburger v. Thomas* (Tex. Civ. App. '09), 118 S. W. 770. Compare Sec. 464.

Sec. 499a. Broker's commissions are earned when contract of exchange is executed.

Where a broker is employed to effect an exchange of property, he earns his commission when the contract of exchange is executed. *Rohkohl v. Sussmann*, 113 N. Y. S. 586, 61 Misc. 246.

Sec. 499b. Commission not due until actual transfer made.

A note evidencing the commission to be paid to plaintiff for procuring a purchaser for defendant's land was directed to plaintiff and signed and delivered by the defendant. It provided that if the deal pending between defendant and a third party for an exchange of property was consummated, defendant would pay plaintiff \$1,000 commissions. *Held*, that no commission was due until the actual transfer of the title of the property by an exchange of deeds. *Goodwin v. Sieman*, 106 Minn. 368, 118 N. W. 1008.

CHAPTER VIII.

SECTION.

- 500. Broker entitled to commissions on actual payment by defaulting vendee.
- 500a. Broker limited to commissions on \$1,000, although property later sold for \$12,500.
- 501. Broker's right to commissions not defeated because to be paid from purchase money.
- 502. Principal liable for commissions on sale to customer at lower price, unless fixed price required.
- 503. Where principal agreed to pay commissions upon receipt of price, broker not entitled before.
- 504. Commissions are usually payable upon completion of the transaction.
- 505. Broker entitled to commissions although purchaser pays more than he authorized him to offer.
- 506. Where purchaser defaulted broker entitled to commissions on actual payments.
- 507. Cases where plaintiff was held not to be the procuring cause of sales, and not entitled to commissions.
- 508. Where sale frustrated through failure to partition, broker entitled to commissions.

SECTION.

- 509. Partial performance entitled broker to recover neither on contract nor on *quantum meruit*.
- 510. Agent in charge of real estate securing responsible tenant, entitled to recover on a *quantum meruit*.
- 511. On principal selling, broker could recover for services on a *quantum meruit*.
- 512. Principal selling for less than agreed price, broker entitled to recover on a *quantum meruit*.
- 513. In the absence of an express contract broker procuring a purchaser may recover on a *quantum meruit*.
- 513a. In absence of fixed rule measure of broker's compensation the value of the service rendered.
- 514. Demand by broker for \$10,000 to release lien defeated his right to commissions.
- 515.. First broker held to have right to commissions by second's relinquishment.
- 515a. Waiver of variance in contract by acquiescence.
- 516. If authority to secure a purchaser is revocable broker finding after barred commissions.

SECTION.

517. If the customer reserves the right to withdraw from transaction if title bad, if exercised bars commissions.

518. Unless exclusive rival broker entitled to commissions on sale by the other.

SECTION.

519. Broker and sub-agent stand in similar relations as to compensation as do principal and agent.

520. Sub-agent entitled to share in commissions though he violated instructions.

520a. Broker liable to sub-agent, though property on sale found not to belong to vendor.

Sec. 500. Broker entitled to commissions on actual payments by defaulting vendee.

The owner of land authorized a broker to make a sale thereof, "commissions to be paid out of the payments as made," and a letter in setting forth the terms of sale provided that on default by the purchaser all prior payments should be forfeited, and neither party have any claim on the other; the broker found a purchaser who gave a deed of trust to secure the payments, and subsequently defaulted; thereafter, the vendor released the vendee from his obligations and conveyed to another, and the broker sued for commissions on the entire price. *Held*, that the contract between the parties did not entitle the broker to commissions except on those payments actually made by the vendee. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871; *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974. See also Secs. 297, 506.

Sec. 500a. Broker limited to commissions on \$1,000, although property later sold for \$12,500.

Plaintiff negotiated a lease of lands belonging to W., under a verbal contract whereby he was to receive a commission of one-third the rent per annum. Before the expiration of the lease W. died, and the defendant was appointed administrator of the estate. The lessees were \$17,500 in default for rent, and defendant foreclosed the landlord's lien on a growing crop on the premises for the arrears in rent, purchasing the same for \$1,000 at the foreclosure sale. Thereafter defendant sold the crop to other parties for \$12,500, and plaintiff, who

had never received any commissions from the rents, brought an action to recover therefor, claiming one-third commissions on the \$12,500 paid defendant, on the theory that it was a part of the balance due on the rent. *Held*, that plaintiff was entitled only to a commission on the \$1,000 paid by defendants for the crop, since the foreclosure was to effect a payment of the rent, and as such the amount thereby received was credited, not the subsequent sale of the property purchased. *Schultz v. Goldman*, 7 Ariz. 279, 64 P. 425.

Sec. 501. Broker's right to commissions not defeated because to be paid from purchase money.

A broker may recover a commission of his principal, although the sale made is not consummated, if it fails solely on account of a defect in the vendor's title of which the broker was neither notified nor had personal knowledge, although the commission was to be paid out of the proceeds of sale. *Cheatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076. See also Sec. 570. For the contrary doctrine, where actual sale was not made as provided by contract. *Bull v. Price*, 7 Bing. (Eng.) 237, 9 L. J. C., P., O. S. 78.

Sec. 502. Principal liable for commissions on sale to customer at lower price, unless a fixed price required.

Where a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for the commission, although the sale is made at a lower price than that originally proposed by him to the broker. *Crook v. Forst*, 116 Ala. 395, 22 S. 540; *Williams v. Bishop*, 11 Colo. App. 378, 53 P. 239; *Schegal v. Allerton*, 65 Conn. 260, 32 A. 363; *Baker v. Murphy*, 105 Ill. App. 151; *Wright v. McClintock*, 136 Mo. App. 438; *Loehde v. Halsey*, 88 Ill. App. 452; *Stievl v. Lally*, 89 Ark. 195, 115 S. W. 1134; *McConaughty v. Mehannah*, 28 Ill. App. 169; *Plant v. Thompson*, 42 Kan. 664, 22 P. 726; *Ratts v. Shepherd*, 37 Kan. 20, 14 P. 496; *Hancock v. Stacey* (Tex. Civ. App. '09), 116 S. W. 177; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *Stinde v. Bleach*, 42 Mo. App. 578; *Lawson v. Black Diamond Coal Mining Co.* (Wash. Sup. '09),

102 P. 759; *Wetzell v. Wagoner*, 41 Mo. App. 509; *Martin v. Silliman*, 53 N. Y. 615; *Martin v. Fagan*, 88 N. Y. S. 472, 95 App. Div. 154; *Levy v. Coogan*, 9 N. Y. S. 534, 16 Daly, 137; *Chilton v. Butler*, 1 E. D. Smith, 150; *Hobbs v. Edgar*, 51 N. Y. S. 1120, 23 Misc. 618; *Gold v. Serrell*, 26 N. Y. S. 5, 6 Misc. 124; *Steinfeld v. Strom*, 63 N. Y. S. 966, 31 Misc. 167; *Keys v. Johnson*, 68 Pa. St. 42; *Byrd v. Frost* (Tex. Civ. App. '94), 29 S. W. 46; *Pierce v. Nichols* (Tex. Civ. App. '08), 110 S. W. 206; *Barnes v. German Sav., etc., Soc.*, 21 Wash. 448, 58 P. 569; *Tinkleton v. Spurck*, 115 Ill. App. 521; *Weeks v. Smith* (N. J. Sup. '10), 75 A. 773.

Unless the right to a commission is made conditional upon a sale being effected at the price fixed in the broker's authority. *Armes v. Cameron*, 19 D. C. 435; *Buhl v. Noe*, 51 Ill. App. 622; *Schwartz v. Yearly*, 31 Md. 270; *Childs v. Ptomey*, 17 Mont. 502, 43 P. 714; *Briggs v. Rowe*, 1 Abb. Dec. (N. Y.) 189, 4 Keyes, 424; *Steinfeld v. Storm*, 63 N. Y. S. 966, 31 Misc. 167; *Largent v. Story* (Tex. Civ. App. '01), 61 S. W. 977; *McArthur v. Slosson*, 53 Wis. 41, 9 N. W. 784; *Newton v. Conness* (Tex. Civ. App. '08), 106 S. W. 892; *Ryan v. Page*, 134 Iowa, 60, 111 N. W. 405; *Bridgeman v. Hepburn*, 13 Brit. Col. 389.

Sec. 503. Where principal agreed to pay commissions upon receipt of price, broker not entitled before.

The principal agreed to pay the broker a commission for selling land when the vendees paid a certain sum and gave their note and mortgage for the balance, the vendees executed their note but never paid the money; the broker was not entitled to commissions. *McPhail v. Buell*, 87 Cal. 115, 25 P. 266; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724.

Sec. 504. Commissions are usually payable upon completion of the transaction.

A real estate broker is entitled to the commissions agreed on for the successful negotiation of an exchange of property placed in his hands, if the terms of the exchange are accepted by the owner, as the obligation to pay the commission then becomes fixed. *Lockwood v. Halsey*, 41 Kan. 166, 21 P. 98. In the absence of a provision to the contrary in the contract of employment. *Frye v. Schwarz*, 87 N. Y. App. Div. 611.

Sec. 505. Broker entitled to commissions although purchaser pays more than he authorized broker to offer.

Where the principal tried to get the broker to negotiate a trade of his land for a house, stating that he was willing to give \$1,000 boot, and would give plaintiff \$100 if the trade was consummated and the trade was made by the principal consenting to give more boot, the broker was entitled to his commission. *Carson v. Baker*, 2 Colo. App. 248, 29 P. 1134. In the absence of an agreement limiting to a fixed price beyond which the purchaser had to go to effect the purchase. *Lestrade v. Vanzini*, 6 La. Ann. 399.

Sec. 506. Where purchaser defaulted broker entitled to commissions on actual payments.

A receiver of an insolvent bank employed the services of an agent to effect a sale of certain realty which he held in right of the bank, agreeing that the agent should receive ten per cent. commission as his compensation; there was no agreement as to when such commission was to be paid, whether out of the cash payments, or on payment of the entire purchase money; the agent sold the property for \$85,000; the purchaser paid \$10,000 cash, and made default as to the residue. *Held*, that the agent was entitled to his commission on so much of the purchase money as was or could be paid, and on that only. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974; *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871. See also Secs. 297, 500.

Sec. 507. Cases where plaintiff was held not to be the procuring cause of sale, and not entitled to commissions.

Hallyday v. Southern Farm Agency, 100 Md. 294, 59 A. 646; *Wood v. Burton*, 47 N. Y. S. 184, 21 Misc. 326; *Burd v. Webster*, 128 Wis. 118, 107 N. W. 23; *Goff v. Hurst* (Ky. Ct. App. '09), 122 S. W. 148.

Sec. 508. Where sale frustrated through failure to partition, broker entitled to commissions.

Defendant authorized plaintiff, a real estate broker, to sell land, and through him a contract of sale to W. was made of a definite number of acres, eighteen of which were to be made

up by defendant's having a thirty-six-acre tract, in which he had an undivided half interest, partitioned; the contract provided that the title was to be passed on by W.'s attorney; the defendant failed to have the partition made, stating that a division line had been adopted by him and his co-tenant, but there was no evidence of this. *Held*, that W.'s refusal to perform the contract on account of the failure to partition being justified, plaintiff was entitled to recover his commissions of defendant. *Albritton v. First Nat. Bk.*, 38 Tex. Civ. App. 614, 86 S. W. 646.

Sec. 509. Partial performance entitles broker to recover neither on contract nor on quantum meruit.

Where a petition by a broker to recover commissions counted on an express contract by defendant to pay a certain price, if plaintiff obtained a purchaser for the entire tract of timber land, etc., and the evidence disclosed only a partial performance, plaintiff was not entitled to recover on a *quantum meruit*. *Veatch v. Norman*, 109 Mo. App. 387, 84 S. W. 350; *Carpenter v. Atlas Imp. Co.*, 108 N. Y. S. 547, 123 App. Div. 706. See also Sec. 935. Mechem on Ag. Sec. 635.

Sec. 510. Agent in charge of real estate, securing responsible tenant, entitled to recover on a quantum meruit.

A complaint alleged that plaintiffs were employed to take charge of defendant's real estate, as agent to rent the same and collect the rents; that they performed their part of the contract by procuring responsible tenants for the property; that defendant revoked their contract of agency, without compensating them for their services. *Held*, that, treating the action as on a *quantum meruit* for services on a contract performed by plaintiffs, the complaint was sufficient. *New Kanawha Coal & Min. Co. v. Wright*, 163 Ind. 529, 72 N. E. 550; *Lockhart v. Hamlin*, 190 N. Y. 132, 82 N. E. 1094.

Sec. 511. On principal selling, broker could recover for services on a quantum meruit.

Where, after defendant had employed plaintiff to sell certain standing timber at specified price and terms, he availed

himself of plaintiff's services and sold the timber to an employee of the person with whom plaintiff had been negotiating on different terms, plaintiff was entitled, in an action on his contract, to join a prayer for a recovery of the reasonable value of the services, and recover on a *quantum meruit*. *McDonald v. Cabiness*, 100 Tex. 615, 98 S. W. 943, affirmed 102 S. W. 720. Compare *Johnson v. Va. & Car. Lumber Co.*, 163 F. 249, 89 C. C. A. 632; *Smith v. Va. & Car. Lumber Co.*, 163 F. 249, 89 C. C. A. 632.

Sec. 512. Principal selling for less than agreed price, broker entitled to recover on a quantum meruit.

An agent under a contract with his principal was to receive all in excess of a stipulated price for which certain timber sold, provided he obtained a purchaser at a price considerably in excess of the minimum price stipulated, but the principal sold the timber on different terms than those agreed upon in the contract. *Held*, that the agent having procured the purchaser was entitled to recover on a *quantum meruit*, although the principal had changed the terms of the sale as provided for in the contract. *McDonald v. Cabiness*, 100 Tex. 615, 102 S. W. 720; *Schultz v. Zelmar* (Tex. Civ. App. '08), 111 S. W. 776.

Sec. 513. In the absence of an express contract broker procuring a purchaser may recover on a quantum meruit.

A broker to procure a purchaser for real estate is entitled to such commissions as are usual for procuring a purchaser for property of similar character and value, unless a different compensation is agreed upon. *Walker v. Baldwin*, 106 Md. 619, 68 A. 25; *Hollis v. Weston*, 156 Mass. 357, 31 N. E. 483; *Hartman v. Warner*, 75 Conn. 197, 52 A. 719; *Lansing v. Johnson*, 18 Neb. 174, 24 N. W. 726; *Baer v. Koch*, 21 N. Y. S. 974, 2 Misc. 334; *Harrel v. Zimpleman*, 66 Tex. 292, 17 S. W. 478; *Phillips v. Roberts*, 90 Ill. 492.

Sec. 513a. In absence of fixed rate measure of broker's compensation the value of the service rendered.

Upon a suit by a broker to recover ordinary commissions for effecting the sale of a colliery, it appeared that commissions

ranged from five to twenty-five per cent. *Held*, in the absence of evidence of a uniform custom or usage, that the measure of plaintiff's compensation should be the value of the service rendered. *Potts v. Aechtermacht*, 93 Pa. St. 138. See also Sec. 587.

Sec. 514. Demand by broker for \$10,000 to release lien defeated his right to commissions.

Complainant's agent executed an agreement in her name, without her authority, giving defendant the exclusive right to purchase or sell a farm for a period of one year for \$20,000, and in case defendant did not exercise his right to purchase, but sold the property he was to receive two per cent. on the \$20,000, and all the farm sold for above such sum as compensation for his services; defendant procured a prospective purchaser to whom he offered the farm for \$20,000, but the purchaser declined to buy at that price, and subsequently made a contract with complainant to purchase the farm for \$22,500; as soon as defendant discovered the purchaser was dealing direct with the owner, defendant filed his contract for record, claiming an option for \$20,000, and refused to release the same unless he was paid \$10,000. *Held*, that such act clouded the title and justified the purchaser's refusal to complete the sale, depriving defendant of the right to commissions. *Woolf v. Sullivan*, 224 Ill. 509, 79 N. E. 646. See also Sec. 290.

Sec. 515. First broker held to have the right to commissions by second's relinquishment.

Where M., who was to receive a commission for a sale of B.'s land, turned over the sale of the land to L., agreeing that L. should have the commissions therefor, to which B. consented before a sale was made, L., on selling the land, was not entitled to a commission as the assignee of M., but because he, with the knowledge and consent of B., sold the land after M. had waived his right to do so. *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775.

Sec. 515a. Waiver of variance in contract by acquiescence.

Though the taking of notes payable on or before maturity was a technical variation from authority to sell on time at a specified rate of interest, the vendor waived his right when,

on seeking time for delivery of possession, he wrote to his broker that everything else would be all right. *Watkins v. Thomas* (Mo. App. '10), 124 S. W. 1063.

Sec. 516. If authority to secure a purchaser is revocable, broker finding after barred commissions.

By the statement of a real estate owner to a broker that if the latter or any one else could secure a purchaser for the land by a certain date, on terms specified, the land might go, gives the broker nothing more than a revocable authority binding the owner to pay commissions only in case a purchaser is found before revocation, and is not an agreement that the agency shall continue until the date specified. *Milligan v. Owen*, 123 Iowa, 285, 98 N. W. 792; *Kane v. Dawson*, 52 Wash. 411, 100 P. 837.

Sec. 517. If the customer reserves the right to withdraw from the transaction if title bad, if exercised, bars commissions.

If the customer reserves the privilege to withdraw from the transaction, in case he finds, upon examination, that the title is bad, the broker is not entitled to a commission upon the customer's refusal, by the exercise of the reserved privilege, to make the purchase for that reason. *Condict v. Coudrey*, 139 N. Y. S. 273, 34 N. E. 781; *West v. Stoeckel*, 6 Ohio Dec. (Rep.) 1082, 10 Am. L. Rec. 309; *Blankenship v. Ryerson*, 50 Ala. 426; *Gülchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572; *Carter v. Harrell* (Tex. Civ. App. '09), 118 S. W. 1139.

Sec. 518. Unless exclusive rival broker not entitled to commissions on sale by the other.

Unless real estate brokers had the exclusive right to make a sale of certain property, they were not entitled to a commission if the sale was made by some one else, even though they secured a purchaser. *Rothenberger v. Turner*, 30 Ky. L. R. 1018, 99 S. W. 1150; *Hennings v. Persons*, 108 Va. 1, 61 S. E. 866; *Mueller v. Bell* (Tex. Civ. App. '09), 117 S. W. 993.

Sec. 519. Broker and sub-agent stand in similar relations as to compensation as do principal and agent.

A real estate broker and his sub-agent stand relatively in the same position, with reference to the right to compensation,

as do the principal and the broker. *Leonard v. Roberts*, 20 Colo. 88, 36 P. 880; *Olsen v. Jordan*, 38 Minn. 466, 38 N. W. 485; *Warren Com. & Inv. Co. v. Hull*, 120 Mo. App. 432, 96 S. W. 1038; *Parker v. Merrell*, 173 Mass. 391, 53 N. E. 913; *Whiting v. Saunders*, 51 N. Y. S. 211, 23 Misc. 332; *Weinstein v. Golding*, 40 N. Y. S. 680, 17 Misc. 613; *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574; *Blake v. Austen*, 33 Tex. Civ. App. 112, 75 S. W. 571; *J. B. Watkin's Ld. Mtge. Co. v. Thetford* (Tex. C. A. '06), 96 S. W. 72; *Barthel v. Peter*, 88 Wis. 316, 60 N. W. 429; *Madler v. Pozorski*, 124 Wis. 477, 102 N. W. 892; *McClary v. Willis*, 35 Wash. 696, 77 P. 1073.

Sec. 520. Sub-agent entitled to share in commissions though he violated instructions.

The fact that a sub-agent in his first negotiations with the customer violates the instructions of the owner to the agent by asking more than the price fixed, will not estop him from claiming a share of the commissions voluntarily paid to the agent on the sale of the land, as the owner alone could complain upon that ground. *Russell v. Andrea*, 79 Wis. 108, 48 N. W. 117.

Sec. 520a. Broker liable to sub-agent though property on sale found not to belong to vendor.

A real estate broker employed to sell land, who agrees to pay another broker a commission, if he procures a purchaser therefor, is liable for the commission if a purchaser is procured, though he afterwards discovers that the land is not the property of the principal. *Barthel v. Peter*, 88 Wis. 316, 60 N. W. 429. See also Sec. 519.

CHAPTER IX.

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545. Undisclosed agreement to divide commissions with purchaser does not bar broker's right thereto.

Sec. 521. Sub-agent entitled to commission for sale made after revocation of authority.

Where the owner of real property employed an agent to find a purchaser therefor, and the latter, within the scope of his authority, but without the owner's knowledge, employed a broker for the same purpose, and the owner revoked the authority given to the agent, and the broker afterward, without notice of the revocation, found a purchaser, it was held that the broker could recover commissions from the owner. *Lamson v. Sims*, 48 N. Y. Super. Ct. 281. Compare *Meehem* on Ag. Sec. 197.

Sec. 522. Sub-agent denied recovery of unlawful commissions.

A broker procured a customer for another broker, with the understanding that the latter should charge for procuring a loan of money at a rate prohibited by statute, and that such commissions should be divided. *Held*, that suit would not lie in behalf of the former broker for his share of such commissions against the latter broker to whom they had been paid by the customer. *Gregory v. Wilson*, 36 N. J. L. 315. Compare Sec. 497.

Sec. 523. Typical cases in which the sub-agent was held entitled to recover share of commissions.

The owner of certain real estate of one hundred acres in extent placed the same in the hands of defendants with authority to sell it for him at the rate of \$4,000 per acre; that thereafter defendants employed plaintiffs to find a purchaser at the rate of \$4,250 per acre; that plaintiffs found parties who

were ready and willing to purchase upon the terms mentioned; that thereafter an agreement was executed whereby defendants promised to pay plaintiffs a commission of \$5,000; that thereafter the sale in question was consummated and the defendants received and accepted from the purchasers their share of the purchase money from such sale, amounting in money, notes and other property to more than \$10,000. *Held*, that plaintiff was entitled to recover. *Olsen v. Jordan*, 38 Minn. 466, 38 N. W. 485; *Warren Com. & Inv. Co. v. Hull*, 120 Mo. App. 432, 96 S. W. 1038; *Murphy v. Hiltbride*, 132 Iowa, 114, 109 N. W. 471; *Prov. Trust Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030; *Taylor v. Barbour*, 90 Miss. 888, 44 S. 988.

Sec. 524. Sub-agent not entitled to recover of his principal for sale made at reduced price.

A broker for the sale of lands who agreed to pay other brokers a certain sum out of his own commissions, if they sold at a certain price, but who had no interest in the land, as such brokers knew, is not liable to them for commissions on a sale at a less price. *Whitcomb v. Dickinson*, 169 Mass. 16, 47 N. E. 426. See also Sec. 422.

Sec. 525. Sub-agent entitled to commissions, though he failed to give the name of purchaser.

Where, in an action on a contract for division of broker's commissions, there was evidence that defendant sold the property to the purchaser secured by plaintiff, in accordance with the contract between them for a division of commissions, and that, at the time of the sale, defendant knew that plaintiff had procured a purchaser, it was immaterial that plaintiff failed to impart to defendant, prior to the sale, the name of the person with whom plaintiff had been negotiating, and to whom the property was subsequently sold. *McClary v. Willis*, 35 Wash. 676, 77 P. 1073; *Feist v. Jerolomen* (N. J. Err. & App. '10), 75 A. 751. See also Secs. 487, 530.

Sec. 526. Broker selling to railroad instead of to syndicate entitled to commissions.

A broker who is promised a commission for selling a street car line to a certain syndicate is entitled to a commission on effecting such sale to a railroad company organized by the syn-

dicade, and the fact that such company was not duly incorporated is no defense. *Smith v. Mayfield*, 60 Ill. App. 266. Compare *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

Sec. 527. Broker entitled to commissions though sale other than that contemplated.

To recover on a contract providing for payment for services for promoting the sale of a street railway, on the conclusion of "any trade" with the prospective vendee, it is immaterial that the trade finally consummated was not the negotiation pending at the time the contract was made. *Alexander v. Wakefield* (Tex. Civ. App. '02), 69 S. W. 77. See Sec. 532.

Sec. 528. Broker's right to commissions not affected by owners' suppositions.

The fact that defendant sold to a person who he thought was purchasing for himself and not for the church, does not affect plaintiff's right to his commissions, where, after learning that the purchase was for the church, defendant conveyed it, when he might have avoided the contract. *McKnight v. Thayer*, 21 N. Y. S. 440; *Bach v. Emerich*, 35 N. Y. Super. Ct. 548.

Sec. 529. Broker's erroneous advice as to liability for sewer tax defeated right to commissions.

A broker was employed to procure a purchaser of real estate; he procured a purchaser who contracted for the purchase thereof; the owner executed a warranty deed conveying the premises to the purchaser; the deed was not delivered and the purchase price paid over, because of the refusal of the owner to pay the cost of sewer tax bills which would be subsequently issued, the construction of the sewer being in progress during the transactions; the attorney of the broker erroneously advised that the owner was liable for the tax bills. *Held*, that the broker was not entitled to commissions. *Mercantile Trust Co. v. Niggeman*, 119 Mo. App. 56, 96 S. W. 293.

Sec. 530. Broker failing to name purchaser in telegram to principal does not defeat commissions.

Where a broker employed to effect a sale has found a purchaser willing to buy upon the terms named, and of sufficient

responsibility, he is entitled to the commissions, although in the telegram announcing the sale he did not name the purchaser. *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790. Compare Secs. 241, 525.

Sec. 531. Where vendor sought to vary terms, and purchaser refused to take, broker entitled to commissions.

Evidence in an action for broker's commissions held sufficient to show that he procured a purchaser on the terms named by defendant, and that the purchaser refused to enter into a contract because defendant sought to vary the terms. *Milne v. Ingersoll Segeant Drill Co.*, 104 N. Y. S. 1053, 120 App. Div. 465; *Millan v. Porter*, 31 Mo. App. 563; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Smith v. Fairchild*, 7 Colo. 510, 4 P. 757; *Finley v. Dyer*, 79 Mo. App. 604; *McQuillen v. Carpenter*, 72 N. Y. App. Div. 595, 76 S. 556; *Beebe v. Ranger*, 35 N. Y. Super. Ct. 452; *Gorman v. Scholle*, 13 Daly, 516; *Michaelis v. Ruffmann*, 76 N. Y. S. 973, 37 Misc. 830; *Halprin v. Schachne*, 57 N. Y. S. 735, 27 Misc. 195; *Hattenback v. Gundersheimer*, 13 N. Y. S. 814.

Sec. 532. Broker entitled to commissions on bringing parties together, though they contract on different terms.

A land owner can not avail himself of the services of an agent who procured a purchaser, to effect a sale himself to such purchaser, and thereby deprive the agent of his commissions, nor can he merely to save the commissions agreed to be paid to the agent, effect such sale at a small reduction from the price at which the agent was authorized to find a purchaser, or make immaterial changes in the terms of the sale. *Crook v. Forst*, 116 Ala. 395, 22 S. 540; *Knowles v. Harvey*, 10 Colo. App. 9, 52 P. 46; *Bryan v. Abert*, 3 App. Cas. (D. C.) 180; *Henry v. Stewart*, 185 Ill. 448, 57 N. E. 190; *Snyder v. Fearer*, 87 Ill. App. 275; *Lipsley v. Holridge*, 71 Ill. App. 652; *Adams v. Decker*, 34 Ill. App. 17; *Lawrence v. Atwood*, 1 Ill. App. 217; *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229; *Welch v. Young* (Iowa Sup. '99), 79 N. W. 59; *Marlott v. Elliott*, 69 Kan. 477, 77 P. 104; *Coleman v. Meade*, 13 Bush. (Ky.) 358; *Woods v. Stephens*, 46 Mo. 555; *Henderson v. Mace*, 64 Mo. App.

393; *O'Toole v. Tucker*, 40 N. Y. S. 695, 17 Misc. 554; *Jones v. Henry*, 36 N. Y. S. 483, 15 Misc. 151; *Keys v. Johnson*, 68 Pa. St. 42; *Huntzman v. Arendt*, 16 S. D. 465, 93 N. W. 653; *Evans v. Gay*, 38 Tex. Civ. App. 442, 74 S. W. 575; *Rieger v. Bigger*, 29 Mo. App. 421; *Corbal v. Beard*, 92 Iowa, 360, 60 N. W. 636; *Lestrade v. Perrara*, 6 La. Ann. 398. See Secs. 527, 68.

Sec. 533. On making a sale defect in the title does not deprive the broker of right to commissions.

A broker employed to effect a sale or lease of property, or employed to effect a loan on the security of real estate, who acts in good faith, is entitled to the commission, although the transaction fails of consummation because of a real or alleged defect in the principal's title, if the broker had no knowledge of the defect in the title at the time of finding the customer. *Clark v. H. G. Thompson Co.*, 75 Conn. 161, 52 A. 720; *Phelps v. Preusch*, 83 Cal. 626, 23 P. 1111; *Middleton v. Findle*, 25 Cal. 76; *Martin v. Ede*, 103 Cal. 157, 37 P. 199; *Smith v. Schiele*, 93 Cal. 144, 28 P. 857; *Dotson v. Millikin*, 27 App. Cas. (D. C.) 500; *Attix v. Phelan*, 5 Iowa, 336; *Davis v. Lawrence*, 52 Kan. 383, 34 P. 1051; *Remington v. Sellers*, 8 Kan. App. 806, 57 P. 551; *Gornhart v. Reutschler*, 72 Ill. 535; *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000; *Toombs v. Alexander*, 101 Mass. 255; *Peet v. Sherwood*, 43 Minn. 447, 45 N. W. 859; *Gauthier v. West*, 45 Minn. 192, 47 N. W. 656; *Roberts v. Kinnons*, 65 Miss. 332, 3 S. 736; *Fullerton v. Carpenter*, 97 Mo. App. 197, 71 S. W. 98; *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723; *Christensen v. Woolley*, 41 Mo. App. 53; *Gerhart v. Peck*, 42 Mo. App. 644; *Holly v. Gosling*, 3 E. D. Smith (N. Y.), 262; *Egan v. Kiefordorf*, 38 N. Y. S. 81, 16 Misc. 385; *Finck v. Riner*, 81 N. Y. S. 625, 40 Misc. 218; *Doty v. Miller*, 43 Barb. (N. Y.) 529; *Cusack v. Aikman*, 87 N. Y. S. 940, 93 App. Div. 579; *Strout v. Kenney*, 107 N. Y. S. 92; *Cox v. Hawke*, 93 N. Y. S. 1117; *Morgan v. Calvert*, 110 N. Y. S. 855, 126 App. Div. 327; *Middleton v. Thompson*, 163 Pa. St. 112, 29 A. 796; *McLaughlan v. Wheeler*, 1 S. D. 497, 47 N. W. 816; *Sweeney v. Ten Mile Oil & Gas Co.*, 130 Pa. St. 193, 18 A. 612; *Cheatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Berg v. San Antonio St.*

R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929 (T. C. A. '98), 47 S. W. 921; *Hamberger v. Thomas* (Tex. Civ. App. '09), 118 S. W. 770; *Conklin v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Green v. Lucas*, 33 L. T. R. N. S. (Eng.) 584; *Godley v. Haley*, 27 Ohio Cir. Ct. 606; *Bankers' Loan & Inv. Co. v. Spindle*, 108 Va. 426, 625 E. 266; *Pinkerton v. Hudson*, 113 S. W. 35 (Ark. Sup. '08).

The broker's commissions do not depend upon the title of his customer, whether defective or whether he has any title. *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Carnes v. Howard*, 180 Mass. 569, 63 N. E. 122; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510; *Knapp v. Wallace*, 41 N. Y. 497.

Sec. 534. Where customer exercises right to withdraw if title defective, broker barred commissions.

It has been held that if a customer reserves the privilege to withdraw from the transaction in case he finds the title defective upon examination, the broker is not entitled to commissions upon the refusal for that reason, by the customer, exercising the reserved right, to complete the purchase. *Condict v. Cowdrey*, 139 N. Y. 273, 34 N. E. 781; *Crockett v. Grayson*, 98 Va. 354, 86 S. E. 477; *Blankenship v. Ryerson*, 50 Ala. 426; *Gülchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572; *Johnson v. Sutton* (Miss. Sup. '09), 49 S. 970; *Arthur v. Porter* (Tex. Civ. App. '09), 116 S. W. 127. See also Sec. 225.

Sec. 535. Where broker is to have part of the profits on the sale, not entitled where it fails by defect in title.

Where a broker agrees to sell land upon condition that the owner shall first make \$500 out of the sale, the broker to have the rest of the profit as his commissions, he is not entitled to the commission for merely finding a purchaser, upon a sale to such purchaser falling through on account of a defect in the title. *Seattle Land Co. v. Day*, 2 Wash. 451, 27 P. 74. Compare *Druker v. Gunn*, 41 Kan. 496, 21 P. 637. See also Sec. 630.

Sec. 536. Payment of commissions to broker may depend on the transfer of title.

Where a broker's commissions were not to be paid for until and unless title passed and the purchaser failed to complete

his purchase, no right to commissions accrued. *Fittichauer v. Van Wyck*, 92 N. Y. S. 241; *Cooper v. O'Neill*, 103 N. Y. S. 122, 53 Misc. 319.

Sec. 537. Broker not entitled to commissions where customer refused to complete purchase on account of a supposed defect in the title.

A land agent is not entitled to commissions or compensation for procuring a purchaser of a plantation, when it is shown that the intended purchaser declined to complete the contract, without fault or neglect on the part of the principal, on account of a supposed defect in the title. *Blankenship v. Ryerson*, 50 Ala. 426; *Gilchrist v. Clark*, 86 Tenn. 563, 8 S. W. 572; *Simrall v. Arthur*, 13 Ky. L. R. (abst.) 682; *Pfang v. Humberg*, 30 Ohio Cir. Ct. R. 711.

Sec. 538. Whether principal or another holds the title, broker on producing buyer entitled to commissions.

Where one employs a real estate agent to find a purchaser for property which he represents as his own, and on the agent producing a purchaser, ready, able and willing to pay the price, refuses to complete the sale, he is liable to the agent in an action for the usual commissions, whether the property belongs to him or to another. *Stanton v. Barnes*, 72 Kan. 541, 84 P. 116; *Cook v. Platt*, 126 Mo. App. 553, 104 S. W. 1131.

Sec. 539. Where sale defeated by want of title, which he knew, broker barred commissions.

Where the broker knew that the principal held only a mortgagee's interest in the property, and might not be able to obtain title by foreclosure, the broker could not recover commissions for negotiations which were not completed because the principal did not obtain title through such proceedings. *Corbin v. Mechanics' & Traders' Bank*, 106 N. Y. S. 573, 121 App. Div. 744; *Montgomery v. Amster* (Tex. C. A. '09), 122 S. W. 307.

Sec. 540. Ignorance of contract by holder of record title did not defeat broker's right to commissions.

Where defendant, having an option on land, put it in the hands of plaintiffs, real estate agents, to trade, and they traded

it with one who, as well as defendant, to the knowledge of both, had agreed to pay the commissions, their right to recover a commission of defendant is not affected by the fact that the owners of the record title of defendant's land, with whom plaintiff claimed no contractual relations, did not know of the agreement as to the commission. *Cook v. Platt*, 126 Mo. App. 553, 104 S. W. 1131.

Sec. 541. Where broker produced a purchaser and a sale failed by a dispute over taxes, broker barred commissions.

A broker is not entitled to commissions for procuring a purchaser of land, where the principal and the proposed purchaser failed to consummate the sale because of a dispute over taxes. *Guthman v. Meyer*, 63 N. Y. S. 971, 31 Misc. 810. See also Secs. 465, 33.

Sec. 542. After memorandum contract signed, and purchaser refused to pay water tax, broker entitled to commissions.

Defendant employed plaintiff to procure a purchaser for certain property at a specified price; plaintiff secured a purchaser at the price; defendant received a payment down and signed a memorandum, expressing the conditions of the agreement as to the terms and time of signing a formal contract, but at the agreed time she refused to sign the contract because the purchaser would not pay the water tax, which had then become a lien on the property. *Held*, that plaintiff was entitled to his commissions. *Brand v. Nagle*, 107 N. Y. S. 156, 122 App. Div. 490.

Sec. 543. Unavailing efforts to perform do not entitle a broker to commissions.

A broker is entitled to no compensation unless a bargain be effected, and even in that event has no claim for reimbursement of his expenses. *Didem v. Duralde*, 2 Rob. (La.) 163; *Sherburne Land Co. v. Ell*, 92 Minn. 114, 99 N. W. 419; *West v. Demone*, 128 Mich. 11, 87 N. W. 95; *Shapiro v. Nadler*, 99 N. Y. S. 879, 51 Misc. 13; *Schane v. Storch*, 107 N. Y. S. 26, 56 Misc. 484; *Ball v. Dolan* (S. D. Sup. '08), 114 N. W. 998; *Bailey v. Carlton*, 43 Colo. 4, 95 P. 542; *English v. Wm. George*

Realty Co. (Tex. Civ. App. '09), 117 S. W. 996. See also Sec. 290.

Sec. 544. To entitle a broker to commissions for a sale his negotiations must be uninterrupted.

To entitle a broker to commissions, where the contract concluded differs from that which the broker was authorized to negotiate, the negotiations commenced by the broker must have continued uninterruptedly, and he must have been actively instrumental throughout in causing the parties to consummate the transaction, and the sale made was satisfactory to the owners. *Woods v. Stephens*, 46 Mo. 555; *Gold v. Sorrell*, 26 N. Y. S. 124.

A broker employed to procure a purchaser of realty for a fixed per cent. of the price, not specified, opened negotiations with a third person and introduced him to the owner. The third person never made any offer to the broker, and the owner refused to give the third person any price or terms, because others were then negotiating for the property. The broker made no further efforts to bring the parties together. Many months later the owner contracted a sale to the third person. *Held*, that the broker was not entitled to commissions. *Wheeler v. Beers* (Colo. Sup. '09), 101 P. 758.

Sec. 545. Undisclosed agreement to divide commissions with purchaser, does not bar broker's right thereto.

An agreement by real estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which said principal agreed to pay. *Scott v. Lloyd*, 19 Colo. 401, 35 P. 733; *Lemon v. Lloyd*, 46 Mo. App. 452; *Lawler v. Armstrong* (Wash. Sup. '09), 102 P. 775; *Chase v. Veal*, 83 Tex. 333; 18 S. W. 597; *Forst v. Farmer*, 46 N. Y. S. 903, 21 Misc. 64.

CHAPTER X.

SECTION.

- 546. Broker not entitled to commissions until he has performed his undertaking.
- 546a. In some States reasonable compensation may be recovered for partial performance of an entire contract.
- 547. Broker not entitled to commissions for procuring contract subject to approval, which is withheld.
- 547a. Broker entitled to commission on alternative contract, which did not bind the buyer even although he approved the title.
- 548. Broker obtaining purchaser for vested remainder on different terms barred commissions.
- 549. Broker does not earn commissions if contract to be void if first payment fails.
- 550. Variance as to name of ranch sold did not deprive broker of right to recover commissions.

SECTION.

- 551. Broker not entitled to commissions for contract too vague for enforcement, on failure of customer to take.
- 552. Withdrawal of land from sale entitled broker, under contract, to commissions.
- 553. Withdrawal and sale by owner in good faith to customer bars broker's commissions.
- 554. Principal paying commissions to broker before purchaser withdrawing cannot recover same.
- 555. Broker entitled to commissions where sale failed because rights of two heirs were not acquired.
- 556. Where purchaser is in default, broker not entitled to commissions.
- 557. When commissions are earned by broker.
- 558. When commissions are not earned by broker.

Sec. 546. Broker not entitled to commissions until he has performed his undertaking.

A broker is not entitled to compensation until he has performed his undertaking. *Ivy Coal Co. v. Long*, 139 Ala. 535, 36 So. 722; *Manby v. Turner*, 13 Colo. App. 358, 57 P. 862; *Cas-*

ton v. Quimby, 178 Mass. 153, 59 N. E. 653, 52 L. R. A. 785; *West v. Stoeckel*, 6 Ohio Dec. (Rep.) 1082, 10 Am. L. R. 309; *Ball v. Dolan* (S. D. Sup. '08), 114 N. W. 998; *Wiggins v. Wilson*, 55 Fla. 346, 45 S. 1011.

If an entirety broker must show full performance, as a condition precedent. *Mechem on Ag. Sec.* 635.

Sec. 546a. In some States recovery may be had for partial performance of an entire contract in an action for reasonable compensation therefor.

In some States the doctrine of *quantum meruit* prevails to recover on failure to perform an entire contract the reasonable value of the services rendered—Michigan, Iowa, Nebraska, Kansas, Texas, Indiana, Missouri and Mississippi. *Mechem on Agency Sec.* 637.

Sec. 547. Broker not entitled to commissions for procuring contract subject to approval which is withheld.

A broker is not entitled to a commission, where he procures a contract between the parties subject to approval, and that approval has been withheld. *Halprinc v. Schachne*, 54 N. Y. S. 1103, 25 Misc. 797; *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109; *Hamlin v. Schulte*, 31 Minn. 486; *Gough v. Coffin* (Tex. Civ. App. '09), 120 S. W. 210; *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652. See references under Sec. 307.

Sec. 547a. Broker entitled to commission on alternative contract, which did not bind the buyer, even although he approved the title.

That the agreement with the broker was in the alternative, and did not bind the buyer to buy even if he approved the title, would not defeat the broker's right to compensation, since it was the fact that the title was not clear to the purchaser that defeated the sale. *Hamberger v. Thomas* (Tex. Sup. '10), 126 S. W. 561.

Sec. 548. Broker obtaining purchaser for vested remainder on different terms barred commissions.

Where plaintiff was employed to sell a vested remainder owned by defendant for \$55,000 net to the defendant, the pur-

chaser to receive \$175,000 if the life tenant should live less than ten years, and \$195,000 if she should live more than eleven years, and the purchaser to be required to reassign to the defendant \$10,000 if the life tenant should die within eleven years, \$20,000, if within ten years, \$25,000, if within nine years, and \$28,000, if within eight years, and the purchaser accepted the proposition to buy, and instead of \$195,000, with certain contingent sums to be reassigned on the death of the life tenant within ten years, not corresponding to those provided in the terms of the contract with plaintiff, he was not entitled to recover the agreed compensation for his services. *Meador v. Brown*, 102 N. Y. S. 32, 116 App. Div. 734. See references under Sec. 307.

Sec. 549. Broker does not earn commissions if contract to be void if first payment fails.

A broker employed to effect a sale does not earn his commissions by procuring one who enters into a contract with the principal which provides that the contract shall be void if the first of several payments of the price is not paid within the stipulated time. *Ramsey v. West*, 31 Mo. App. 676; *Jones v. Eilenfelt*, 28 Wash. 687, 69 P. 368. See references under Sec. 307.

Sec. 550. Variance as to name of ranch sold did not deprive broker of right to recover commissions.

Where the plaintiff, in an action by a broker to recover commissions, set out in *haec verba* the written contract, which spoke of the land as the "Abbey Ranch," the fact that the plaintiff showed where the land was situate did not create a variance between the contract set out and the one pleaded in its legal effect. *Hill v. McCoy*, 1 Cal. App. 159, 81 P 1015.

Sec. 551. Broker not entitled to commissions for contract too vague for enforcement on failure of customer to take.

A real estate broker employed to sell property procured from a prospective purchaser the following signed memorandum: "I authorize Mr. M. to offer \$220,000 for Mr. K.'s house, corner of Sixty-fourth and Fifth Avenue, July 27, 1894, signed, J. T.

Martin." *Held*, that it was at most a provisional proposition, leaving unexpressed essential details, and was too vague and uncertain to entitle a real estate broker procuring it to his commissions from the vendor, where the proposed purchaser refused to complete the sale. *Montgomery v. Knickerbacher*, 50 N. Y. S. 128, 27 App. Div. 117. See also Sec. 556.

Sec. 552. Withdrawal of land from sale entitled broker, under contract, to compensation.

By the terms of the contract of employment between the owners of land and a broker, commissions became due upon withdrawal of the property from sale within a certain time. *Held*, that the notice recited that it was given under the contract by the owner to the broker not to sell said land, that it had been withdrawn from the market within that time, while the owner was repudiating a sale by the broker, was a withdrawal of the premises from sale by entitling the broker to his commissions, not as damages for a breach of the contract but as a debt. *Maze v. Gordon*, 96 Cal. 61, 30 P. 962; *Gamble v. Cleveland Cliffs Iron Co.*, 158 Fed. 49, 89 C. C. A. 379. Compare Secs. 132, 585.

Sec. 553. Withdrawal and sale by owner in good faith to customer bars broker's commissions.

A real estate broker is not entitled to commissions on a sale of property by the owner, after he has in good faith withdrawn it from the hands of the broker, at a time when no negotiations are pending, though the sale is made to one to whom the broker made an effort to sell. *Stedman v. Richardson*, 100 Ky. 79, 18 Ky. L. R. 567, 37 S. W. 259.

Sec. 554. Principal paying commissions to broker before purchaser withdrawing can not recover same.

Where a principal pays a broker his commission before the purchaser withdraws from the transaction, the broker being entitled thereto will retain the same. *Moore v. Irvin* (Ark. Sup. '09), 116 S. W. 662; *Conklin v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Emerson v. Coddington*, 55 N. Y. Super. Ct. 336. Except

when the broker has acted in bad faith. *Lockwood v. Halsey*, 41 Kan. 166. 21 P. 98.

Sec. 555. Broker entitled to commissions where sale failed because rights of two heirs were not acquired.

Where a sale of land negotiated by plaintiff for defendant failed because the record did not show that the defendant had acquired the alleged outstanding interests of two heirs in the land, plaintiff's right to recover commissions was not affected by the fact that at the time of the purchaser's refusal to accept title there was a will in existence under which defendant acquired full title to the property, and of which will none of the parties had knowledge. *Weaver v. Richards*, 144 Mich. 395. 108 N. W. 382, 6 L. R. A. N.S. 855.

Sec. 556. Where purchaser is in default, broker not entitled to commissions.

A contract for the purchase of real estate provided that the same should be void, at the will of the vendor, if default should be made by the vendee in completing the purchase by making the future cash payments and executing a mortgage for the balance of the purchase price, time being of the essence of the contract, \$500 cash paid upon the execution to be forfeited by the vendee; a commission contract executed at the same time, provided that the vendor would pay the broker a certain sum if the contract of purchase should be performed by making the payments and executing the mortgage as provided. *Held*, that the vendee having failed to make the deferred cash payments and to execute the mortgage, the vendor having been ready, willing and able to perform the contract until such default, could take advantage thereof, cancel the contract, and remove the cloud from the record by appropriate legal proceedings: under such circumstances the commission was not earned. *Van Norman v. Fitchett*, 100 Minn. 145, 110 N. W. 851. See also Secs. 179 551.

Sec. 557. When commissions are earned by broker.

Where an agent, given authority to sell land, exercises his discretion as to price, examines the title, and fixes the price

and terms, he may employ a real estate broker to find a purchaser, and a sale by him will be enforced, if he was required to obtain his commission in addition to the price agreed on, although the agent may have been requested by his principal not to employ a sub-agent. *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367.

One for whom a broker assumes to act, without authority, may, by accepting the benefits of the broker's services, ratify the act, and so make himself liable for compensation, provided the principal does so with knowledge that the broker assumed to act for him as such. *Merrill v. Latham*, 8 Colo. 263, 45 P. 524; *Dayton v. Am. Steel Barge Co.*, 73 N. Y. S. 316, 36 Misc. 223; *McKinne v. Hope*, 118 Ga. 462, 45 S. E. 413; *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388; *Hunt v. Jones*, 105 Mo. App. 106, 79 S. W. 486; *Charles v. Cook*, 84 N. Y. S. 867, 88 App. Div. 81; *Lyle v. Bennett*, 70 N. Y. S. 283, 34 Misc. 476; *Markham v. Washburn*, 18 N. Y. S. 355; *McCormack v. McCaffery*, 74 N. Y. S. 836, 36 Misc. 775; *Twelfth Street Market v. Jackson*, 102 Pa. St. 269; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256.

A departure by a real estate agent from the terms of his authority is cured by the principal's subsequent ratification, and the compensation fixed by the original contract of employment controls. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882. A broker employed to sell at a certain commission may employ a sub-agent for a share of the commission, and recover from his principal the commission agreed to be paid. *Carter v. Webster*, 79 Ill. 435; *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Henning v. Burch*, 90 Minn. 43, 95 N. W. 578; *Corning v. Calvert*, 2 Hilt. (N. Y.) 56.

A real estate broker who undertakes to furnish a purchaser is bound to act in good faith, and when one is presented, the employer is bound to accept him or to pay the commission, provided the customer is able, ready and willing to make the purchase on the terms stipulated. *Coleman v. Meade*, 13 Bush. (Ky.) 358; *Barber v. Heade*, 30 Ohio Cir. Ct. R. 127; *Stewart v. Fowler*, 53 Kan. 537, 36 P. 1002; *Bach v. Emerich*, 35 N. Y. Super. Ct. 548; *Fraser v. Wychoff*, 63 N. Y. 445; *Dreyer v. Bauch*, 42 How. Pr. (N. Y.) 22, 3 Daly, 434; *Martin v. Billings*,

2 City Ct. R. (N. Y.) 85; *Pratt v. Patterson*, 112 Pa. St. 475, 3 A. 858.

In an action for a commission for selling property where it appeared that defendant gave plaintiff a written option to purchase land, it is competent to show a parol agreement by which the plaintiff was to find a purchaser and to receive as commissions all realized on the sale above a specified amount, and that such option contract was executed for the convenience of plaintiff, and the broker was held entitled to recover his commissions. *Ricmer v. Rice*, 88 Wis. 16, 59 S. W. 450.

An agreement by real estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which such principal agreed to pay. *Scott v. Lloyd*, 19 Colo. 401, 35 P. 733; *Lemon v. Lloyd*, 46 Mo. App. 452; *Chase v. Veal*, 83 Tex. 333, 18 S. W. 597; *Forst v. Farmer*, 46 N. Y. S. 903, 21 Misc. 64.

A broker may be entitled to compensation other than a commission; *e. g.*, for finding a purchaser, to the reasonable; *Hawkins v. Chandler*, 8 Houst. (Del.) 434, 32 A. 464; *Beister v. Evans*, 59 Ill. App. 181; *McMurtry v. Madison*, 18 Neb. 291, 25 N. W. 85; *Donald v. Lawson*, 87 N. Y. S. 485; *Alexander v. Wakefield* (Tex. Civ. App. '02), 69 S. W. 77; or agreed value of the services rendered. *Delaplaine v. Turnley*, 44 Wis. 31.

A broker may be entitled to a commission on a sale effected by the principal, without the broker's co-operation, if the contract so provides. *Keniwell v. Skelly*, 130 Cal. 555, 62 P. 1067; *Haskins v. Fogg*, 60 N. H. 402.

If a broker merely brings together two parties who desire to exchange or sell their land, and his employment then ends, and the parties themselves settle the terms of the transaction, he is a mere middleman and may recover a commission from each party, if each has agreed to pay him. *Clark v. Allen*, 125 Cal. 276, 57 P. 985; *Manders v. Croft*, 3 Colo. App. 236, 32 P. 836; *Cox v. Haren*, 127 Ind. 325, 26 N. E. 822; *Muller v. Kutzleb*, 7 Bush. (Ky.) 253; *Rupp v. Sampson*, 16 Gray (Mass.), 398; *Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916; *Banney v. Donovan*, 78 Mich., 318, 44 N. W. 276; *Childs v.*

Plomey, 17 Mont. 502, 43 P. 714; *Knauss v. Gottfried-Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867; *Norton v. Genesee Nat. Sav., etc., Ass'n*, 68 N. Y. S. 32, 57 App. Div. 520; *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Bonwell v. Auld*, 29 N. Y. S. 15, 9 Misc. 65; *Balheimer v. Richardt*, 55 How. Pr. 414; *Haviland v. Price*, 26 N. Y. S. 757, 6 Misc. 372; *Collins v. Fowler*, 8 Mo. App. 588.

Where a contract is signed by the buyer and seller which contains stipulations by each in favor of the other of nearly equal value, the broker who brought them together is the proper custodian thereof, in the absence of other arrangements, and a delivery to the broker by each, after signing, amounts to a delivery to the other, and the final delivery by the seller to the broker completes the execution as a binding agreement, so as to entitle the broker to his commissions for finding a purchaser. *Green v. Hollingshead*, 40 Ill. App. 195.

Where the minds of the vendor and the purchaser have met on a contract to sell real estate, the broker who procured the execution of such contract is entitled to recover his promised commission, notwithstanding any vagueness in the terms of the agreement. *Folinsbee v. Sawyer*, 36 N. Y. S. 405, 15 Misc. 293, 51 N. E. 994, 157 N. Y. 196. If the right to a commission is dependent upon the payment of the price by the purchaser, the broker must show either payment, *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775, or a tender thereof, or he is not entitled to a commission. *Fiske v. Soule*, 87 Cal. 313, 25 P. 430.

Under a contract providing for the payment of commissions "at the date of the payment of the purchase price," or "in installments according to payments by said purchaser," the broker was entitled to his commissions on each partial payment, payment of commissions not being dependent on the payment of the entire purchase price, although the principal, a part owner, received no part of the payments. *Frank v. Bonnevie*, 20 Colo. App. 164, 77 P. 363.

A proviso in a broker's contract that the commission shall be payable out of the first cash payment, is not a condition precedent to the broker's right to recover commissions, and does not mean that unless there is a cash payment, there is

to be no commission paid. *Finch v. Guardian Trust Co.*, 92 Mo. App. 263.

The mere fact that the interest and insurance clauses in the contract of sale had not been definitely arranged before the day on which the contract was presented for signature, no objection being raised by the purchaser, will not deprive the broker of his commissions. *Beebe v. Ranger*, 35 N. Y. Super. Ct. 452. And the broker does not lose his right to a commission merely because the principal and the customer can not, in an agreement for an exchange, be brought to terms on a particular point, if they come to a general agreement. *Wychoff v. Bliss*, 12 Daly (N. Y.), 324. Compare Sec. 33.

The right of a broker who has obtained a purchaser is not affected by the fact that the vendor did not understand the contract as written, where the broker himself was not guilty of fraud or deception. *Bach v. Emerich*, 35 N. Y. Super. Ct. 548; *McKnight v. Thayer*, 21 N. Y. S. 440.

The fact that the contract bound the purchaser only to forfeit a cash payment of \$500 is immaterial, where it appears that a tender of the whole price was made by the purchaser to the vendor, who refused to convey the property, and the broker was entitled to recover commissions. *Fiske v. Soule*, 87 Cal. 313, 25 P. 430.

There are cases holding, that if the negotiations between the principal and the customer continue uninterruptedly after the expiration of the time allowed the broker, and a sale is made of which the broker is the procuring cause, he is entitled to a commission, although the broker did not bring the parties to terms within the time limited in the contract of employment. *Griswold v. Pierce*, 86 Ill. App. 406; *Jaeger v. Glover*, 89 Minn. 490, 95 N. W. 311; *Goffe v. Gibson*, 18 Mo. App. 1; *Michaelis v. Gaeren*, 41 N. Y. S. 563, 9 App. Div. 495, 75 N. Y. St. 952; *Vanderveer v. Suydam*, 31 N. Y. S. 392, 83 Hun, 116; *Shipman v. Wilkeson*, 112 N. Y. S. 895.

To be entitled to a commission where no sale is actually made, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase. *Bingham v. Davidson*, 141

Ala. 551, 37 S. 738; *Sharpley v. Moody*, 44 S. 650, 152 Ala. 549; *Sayre v. Wilson*, 86 Ala. 151, 5 S. 157; *Crook v. Forst*, 116 Ala. 395, 22 S. 540; *Boyson v. Frink*, 80 Ark. 254, 96 S. W. 1056; *Gunn v. State Bank*, 99 Cal. 349, 33 P. 1105; *Hill v. McCoy*, 1 Cal. App. 159, 81 P. 1015; *Carlin v. Lifuer*, 2 Cal. App. 590, 84 P. 292; *Vandercook v. Wilmans* (Cal. App. '06), 87 P. 1116; *Shanks v. Michael*, 4 Cal. App. 553, 88 P. 596; *Coward v. Clinton*, 122 Cal. 451, 55 P. 147; *Quitson v. Perrin*, 120 Cal. 255, 52 P. 632; *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642; *Masten v. Griffing*, 33 Cal. 111; *Wagner v. Morris*, 39 Colo. 106, 88 P. 973; *Silberberg v. Chipman*, 42 Colo. 20, 93 P. 1130; *King Powder Co. v. Dillon*, 42 Colo. 316, 96 P. 439; *Ross v. Smiley*, 18 Colo. App. 204, 70 P. 766; *Buckingham v. Harris*, 10 Colo. 455, 15 P. 817; *Carter v. Owens* (Fla. Sup. '09), 50 S. 641; *Furlow v. Benoit* (La. Sup. '09), 50 S. 785; *Anderson v. Olsen* (Minn. Sup. '10), 124 N. W. 3; *Dotson v. Milliken*, 27 App. Cas. (D. C.) 500, 209 U. S. 237; *Jones v. Holladay*, 2 App. Cas. (D. C.) 279; *Wiggins v. Wilson*, 55 Fla. 346, 45 S. 1011; *Indian Trust Co. v. Sandlin*, 125 Ga. 222, 54 S. E. 65; *Phinzy v. Bush*, 129 Ga. 479, 59 S. E. 259; *Wood v. Brodersen*, 12 Idaho, 190, 85 P. 490; *Mercy v. Whallon*, 115 Ill. App. 435; *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974; *Scott v. Stewart*, 115 Ill. App. 535; *Lemon v. Carter*, 116 Ill. App. 421; *Whalen v. Gore*, 116 Ill. App. 504; *Newman v. Lumley*, 125 Ill. App. 382; *Oldham v. Howser*, 125 Ill. App. 543; *Walber v. Chambers*, 128 Ill. App. 624; *Packer v. Sheppard*, 127 Ill. App. 598; *Nolan v. East*, 132 Ill. App. 634; *Long v. Hand*, 57 Ill. App. 134; *Faber v. Vaughan*, 108 Ill. App. 553; *Kilpatrick v. McLaughlin*, 108 Ill. App. 463; *Jeffries v. Loving*, 106 Ill. App. 380; *Phillips v. Dowhouser*, 103 Ill. App. 50; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Ward v. Lawrence*, 70 Ill. 295; *Fox v. Starr*, 106 Ill. App. 273; *Hanrahan v. Ulrich*, 107 Ill. App. 626; *Schmidt v. Keeler*, 63 Ill. App. 487; *Isphering v. Wolf*, 36 Ind. App. 250, 75 N. E. 598; *Prov. Trust Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030; *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710; *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229; *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *Grieb v. Koefler*, 127 Iowa, 314, 106 N. W. 113; *Sherburne Land Co. v. Sexton*, 130 Iowa, 85, 106

N. W. 378; *McDermott v. Mahoney* (Iowa Sup.), 106 N. W. 925, 115 N. W. 32; *McGuire v. Farber*, 125 Iowa, 533, 101 N. W. 279; *Tracey v. Forbes*, 132 Iowa, 250, 109 N. W. 772; *Clements v. Stapleton*, 136 Iowa, 137, 113 N. W. 546; *Rounds v. Alee*, 116 Iowa, 345, 89 N. W. 1098; *Cassady v. Sealy*, 69 Iowa, 509, 29 N. W. 432; *Bird v. Phillips*, 115 Iowa, 703, 87 N. W. 414; *Long v. Thompson*, 73 Kan. 76, 84 P. 552; *Morris v. Francis*, 75 Kan. 580, 89 P. 901; *Sandefur v. Hines*, 69 Kan. 168, 76 P. 444; *Coleman v. Meade* (Ky.), 13 Bush. 358; *Guthrie v. Bright*, 26 Ky. L. R. 1021, 82 S. W. 985; *Jacob v. Buchanan*, 11 Ky. L. R. (abst.) 861; *Curry v. Fetter*, 15 Ky. L. R. (abst.) 494; *Smith v. Lawrence*, 98 Me. 92, 56 A. 455; *Carnes v. Howard*, 180 Mass. 569, 63 N. E. 122; *Rice v. Mayo*, 107 Mass. 550; *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069; *Whitaker v. Engle*, 111 Mich. 205, 69 N. W. 493; *Hubbard v. Leiter*, 145 Mich. 387, 108 N. W. 735; *McDonald v. Smith*, 99 Minn. 42, 108 N. W. 291; *Pett v. Sherwood*, 47 Minn. 347, 50 N. W. 241, 929; *Rothschild v. Burritt*, 47 Minn. 28, 49 N. W. 393; *Annabell v. Traverse Land Co.* (Minn. Sup. '09), 121 N. W. 233; *Huba-check v. Hazard*, 83 Minn. 437, 86 N. W. 426; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Cullen v. Bell*, 43 Minn. 226, 45 N. W. 428; *Enochs v. Paxton*, 87 Miss. 660, 40 S. 14; *Johnson v. Sutton* (Miss. Sup. '09), 49 S. 970; *Huggins v. Hearne*, 74 Mo. App. 86; *McCray v. Pfof*, 118 Mo. App. 672, 94 S. W. 998; *Morgan v. Keller*, 194 Mo. 663, 92 S. W. 75; *Veatch v. Norman*, 95 Mo. App. 500, 69 S. W. 472; *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157; *Brown v. Smith*, 113 Mo. App. 59, 87 S. W. 556; *Butts v. Ruby*, 85 Mo. App. 405; *Finley v. Dyer*, 79 Mo. App. 604; *Hayden v. Grillo*, 26 Mo. App. 289; *Chiple v. Lenthe*, 60 Mo. App. 15; *Gelott v. Ridge*, 117 Mo. 533, 23 S. W. 882; *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Harmon v. Enright*, 107 Mo. App. 560, 81 S. W. 1180; *Yoder v. White*, 75 Mo. App. 155; *Warren v. Cram*, 71 Mo. App. 638; *Siemson v. Homan*, 35 Neb. 892, 53 N. W. 1012; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Stewart v. Smith*, 50 Neb. 631, 70 N. W. 235; *Tracey v. Dean*, 77 Neb. 382, 109 N. W. 505; *Parker v. Estabrook*, 68 N. H. 349, 44 A. 484; *Courtier v. Lydecker*, 71 N. J. L. 511, 58 A. 1093; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Bloodgood v. Short*, 98 N. Y.

S. 775, 50 Misc. 286; *Moore v. Maguire*, 98 N. Y. S. 752; *Shapiro v. Nadler*, 99 N. Y. S. 879, 51 Misc. 13; *O'Toole v. Tucker*, 40 N. Y. S. 695, 17 Misc. 554, 75 St. 101; *Martin v. Wermann*, 95 N. Y. S. 284, 107 App. Div. 482; *Miller v. Barth*, 71 N. Y. S. 989, 35 Misc. 372, 74 N. Y. S. 869, 36 Misc. 810; *Allen v. James*, 7 Daly (N. Y.), 13; *Seidman v. Banner*, 51 Misc. (N. Y.) 10, 99 N. Y. S. 862; *Behrman v. Marcus*, 102 N. Y. S. 467; *Lovell v. Clench*, 101 N. Y. S. 174, 115 App. Div. 635; *McGill v. Gargoula*, 103 N. Y. S. 113; *Rosenstein v. Bogel*, 108 N. Y. S. 957, 124 App. Div. 527; *Willner v. Seale*, 111 N. Y. S. 699, 127 App. Div. 180; *Van Orden v. Morris*, 18 Misc. (N. Y.) 579, 42 N. Y. S. 473; *Moses v. Helmke*, 41 N. Y. S. 557, 18 Misc. 357; *Duclos v. Cunningham*, 102 N. Y. S. 678, 6 N. E. 790; *Miller v. Irish*, 67 Barb. (N. Y.) 256; *Smith v. Smith*, 1 Sweeney (N. Y.), 552; *Krahner v. Heilman*, 16 Daly (N. Y.), 132, 9 N. Y. S. 633; *Burling v. Gunther*, 12 Daly (N. Y.), 6; *Folinsbee v. Sawyer*, 28 N. Y. S. 698, 8 Misc. 370; *Barnard v. Monnott*, 1 Abb. Dec. (N. Y.) 108, 3 Keyes, 203, 33 How. Pr. 440; *Boyd v. Imp. Prop. Holding Co.*, 120 N. Y. S. 850; *Verder v. Seaton*, 83 N. Y. S. 159, 85 App. Div. 196; *Dennis v. Charlick*, 6 Hun (N. Y.), 21; *Heinrich v. Kern*, 4 Daly (N. Y.), 74; *Levy v. Ruff*, 22 N. Y. S. 744, 3 Misc. 147; *Steinhouse v. Klueppel*, 81 N. Y. S. 116, 80 App. Div. 445; *Curtis v. Mott*, 35 N. Y. S. 983, 90 Hun, 439; *Folsom v. Lewis*, 36 N. Y. S. 270, 14 Misc. 605; *Mullenhoff v. Gensler*, 15 N. Y. S. 673; *Raleigh, R. E. Trust Co., v. Adams*, 145 N. C. 161, 58 S. E. 1008; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253; *Heintz v. Boehmer*, 4 Ohio N. P. 226, 6 Ohio S. & C. P. Dec. 362; *Birch v. McNaught* (Okla. Sup. '09), 101 P. 1049; *Yoder v. Randal*, 16 Okla. 308, 83 P. 537, 3 L. R. A. n.s. 576; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719; *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651; *Howie v. Batrud*, 14 S. D. 648, 86 N. W. 747; *Ornyski v. Menger*, 15 Tex. Civ. App. 448, 39 S. W. 388; *Smye v. Groesbeck* (Tex. Civ. App. '02), 73 S. W. 972; *Brackenridge v. Claridge* (Tex. Civ. App. '97), 42 S. W. 1005, reversed 91 Tex. 127, 144 S. W. 819; 43 L. R. A. 593; *Hamberger v. Thomas* (Tex. Civ. App. '09), 118 S. W. 770; *Baldwin v. Smith* (Tex. Civ. App. '09), 119 S. W. 111; *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W.

244; *Reynolds-McGuinness Co. v. Green*, 78 Vt. 28, 61 A. 556; *Cooper v. Upton* (W. Va. Sup. '09), 64 S. E. 523; *Neely v. Lewis*, 38 Wash. 20, 80 P. 175; *Neely v. Schultz*, 38 Wash. 699, 80 P. 176; *Muir v. Moeller*, 46 Wash. 601, 90 P. 1042; *Barnes v. German Sav., etc., Soc.*, 21 Wash. 448, 58 P. 569; *English v. Wm. George Realty Co.* (Tex. Civ. App. '09), 117 S. W. 996; *Little v. Fleischman* (Utah Sup. '09), 101 P. 984; *Frinck v. Gilbert* (Wash. Sup. '09), 101 P. 770; *Burden v. Briquilet*, 125 Wis. 341, 104 N. W. 83; *Arnold v. Nat. Bk. Waupaca*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. N.S. 580; *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509; *McArthur v. Slosson*, 53 Wis. 41, 9 N. W. 784; *Frost v. Houx*, 15 Wyo. 353, 89 P. 568; *McGavock v. Woodlief*, 20 Howard (U. S.), 221; *Brydes v. Clement*, 14 Manitoba, 588.

If the broker employed to find a purchaser brings to the owner a person who is able, ready and willing to buy on the owner's terms, he is entitled to compensation, although he does not make or negotiate a binding contract of purchase. *Buckingham v. Harris*, 10 Colo. 455, 15 P. 817; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Ward v. Lawrence*, 79 Ill. 295; *Goodmanson v. Rosenstein*, 114 Ill. App. 243; *Fox v. Starr*, 106 Ill. 273; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710; *Burling v. Gunther*, 12 Daly (N. Y.), 6; *Folinsbee v. Sawyer*, 28 N. Y. S. 698, 8 Misc. 370; *Heintz v. Boehmer*, 4 Ohio N. P. 226, 6 Ohio C. & C. Pl. Dec. 362; *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651; *Barnes v. German, etc., Sav. Soc.*, 21 Wash. 448, 58 P. 569; *Brydes v. Clement*, 14 Manitoba, 588; *Marriott v. Brennan*, 14 Ont. L. R. 508, 10 Ont. W. R. 159; *Willard v. Wright* (Mass. Sup. '09), 89 N. E. 559; *Dean v. Williams* (Wash. Sup. '10), 106 P. 130; *Beonger v. Clark* (Kan. Sup. '09), 106 P. 39; *Simmons v. Oneth* (Mo. App. '10), 124 S. W. 534; *Watkins v. Thomas* (Mo. App. '10), 124 S. W. 1063; *Slayback v. Wetzel* (Me. App. '09), 123 S. W. 982.

A broker employed to sell lands, as distinguished from a broker employed merely to find a purchaser, to be entitled to compensation, must effect a sale or procure from his customer a binding contract therefor. *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724.

An offer to buy 290,000 feet of land, to be taken from a par-

cel containing 500,000 feet, said 290,000 feet to be divided as to front and back lands from the whole parcel as nearly equal as possible, where accepted by the owner of the land, entitles the broker employed to find a purchaser therefor to his commission, and the owner will not be heard to say it is too indefinite. *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793.

Where the owner of property placed it with a real estate broker for sale, who accordingly advertised it, and the purchaser thus derived information that the property was for sale, and afterwards negotiated directly with the owner and purchased the property, the broker was entitled to his commissions. *Kilbourn v. King*, 6 D. C. 310; *Tyler v. Parr*, 52 Mo. 249; *Bell v. Kaiser*, 50 Mo. 150; *Anderson v. Cox*, 16 Neb. 10, 20 N. W. 10; *Kiernan v. Bloom*, 86 N. Y. S. 899, 91 App. Div. 429; *Jackson v. Carrick*, 25 Weekly Notes Cas. (Pa.) 132. There is authority to support the contrary doctrine. *Charlton v. Wood*, 11 Heisk. (Tenn.) 19.

Where a broker employed to sell land negotiates unsuccessfully with another broker, and the latter subsequently obtains authority from the principal under which he effects a sale, the fact that the broker after the sale was promised by the purchaser an interest in the profits of the land, in consideration that he should look after it, and try to effect a sale at an increased price, did not constitute him a purchaser so as to entitle the first broker employed to the commission. *Donville v. Comstock*, 110 Mich. 693, 69 N. W. 79.

Plaintiff was employed by defendant to sell certain premises, and procured a purchaser at \$7,000, to be paid by the assumption of a first mortgage for \$3,500, \$2,500 in cash, and the giving of a second mortgage for \$1,000, with interest at five per cent.; this offer was accepted and a written contract prepared, which provided that the \$1,000 should be evidenced by a demand note; the purchaser declined to perform unless given six months within which to pay the latter amount; the owner refused to extend the credit longer than sixty days; it was held that under his agreement the purchaser was entitled to a reasonable time within which to pay such sum, and as his demand for six months was reasonable, plaintiff was entitled

to commissions for the sale. *Wendle v. Palmer*, 77 Conn. 12, 58 A. 12.

If the principal enters into a contract with the purchaser furnished by the broker, the principal will be held to have favorably determined the purchaser's responsibility and the commission is due, although the purchaser proves irresponsible. *Stievel v. Lally*, 89 Ark. 195, 115 S. W. 1134; *Wray v. Carpenter*, 16 Colo. 271, 27 P. 248; *Wright v. Brown*, 68 Mo. App. 577; *Brady v. Foster*, 75 N. Y. S. 994, 72 App. Div. 416. Compare *Butler v. Baker*, 17 R. I. 582, 23 A. 1019.

As a slaughter house erected on the lot purchased is not shown to be a nuisance, and there is nothing in the letter or spirit of the contract to prevent the use of the lot for that purpose, defendant can not resist plaintiff's claim for commissions, because the lot is so used. *Kavanaugh v. Ballard*, 21 Ky. L. R. 1683, 56 S. W. 159.

Where W. agrees, for a valuable consideration, to pay to a broker a certain sum in case either W. or G. should "sell" the described premises, a bargain made by W., unaided by G., to sell the land, and a conveyance accordingly by himself and wife, was a sale within the meaning of the contract. *Goward v. Waters*, 98 Mass. 596.

An agent for the sale and management of the estates of absent proprietors was held to be entitled to ten per cent. on all collections made by him and remitted, and to a *per diem* allowance for the days spent by him in the management of the estate. *West N. J. Society v. Morris*, Peters (U. S. C. C.), 59.

Under a contract by which defendant agreed to pay plaintiff a specified commission if he (defendant) succeeded in selling his land on certain terms to a person whom plaintiff had brought to him, plaintiff is entitled to the commission, whether the subsequent sale to that person was effected through plaintiff's efforts, or direct by defendant, or through the efforts of some third person. *Gouge v. Hoyt*, 127 Iowa, 340, 101 N. W. 463.

Under a contract to pay plaintiff a certain commission on a sale of defendant's farm, or any part of it, at a certain price accepted by defendant, where plaintiff offered the farm to a party who subsequently bought it through another agency, plaintiff was not bound to actually make a sale to entitle him

to a commission, since the contract merely implied an employment to assist in making a sale. *Terry v. Reynolds*, 111 Wis. 122, 86 N. W. 557.

A Frenchman residing in Iowa wrote to his neighbor, also a Frenchman and a land broker, who had gone on a visit to France, to procure him a purchaser for his farm at \$4,000, for which he would allow him \$200 brokerage. The broker was approached a year later by a Frenchman in New York who desired to purchase a farm. The broker took him to Iowa, showed him the farm in question, told the seller to be reasonable in his terms, and afterwards remarked to a witness that he had fetched the seller to terms. The purchaser took the land at \$4,000. *Held*, that the evidence was insufficient to show that the broker was the agent of the buyer, and not of the seller, and that he was entitled to the agreed compensation of \$200. *Dubois v. Dubois*, 54 Iowa, 216, 6 N. W. 261.

An agreement by brokers effecting an exchange of lands that the owner of one piece shall pay no commissions until they have placed mortgages on the other piece, is merely a condition, and the commission is one on the exchange, and not the result of the distinct transaction. *Parker v. Merrill*, 173 Mass. 391, 53 N. E. 913.

Where a broker, having but a limited time within which to effect a sale, failed to do so within that time, and the principal declined to be further bound; and subsequently, the broker sought to have him again consent to make the sale, and to induce him to do so agreed to charge less commissions than those contemplated, and thus procured the seller to consummate a sale, the commissions of the broker are to be charged under the new contract and not that originally made. *Phinzy v. Bush*, 129 Ga. 479, 59 S. E. 259.

A broker who accomplishes the purposes of his agency in accordance with his instructions earns his compensation. *Harvey v. Hamilton*, 155 Ill. 377, 40 N. E. 592.

Sec. 558. When commissions are not earned by broker.

Ordinarily a broker is not entitled to commissions for performing services which by the local custom are rendered gratuitously. *Courey v. Hoover*, 10 La. Ann. 437. If a broker em-

ployed to negotiate a loan abandons the employment he is not entitled to a commission on the transaction being afterwards effected. *Everett v. Farrel*, 11 Ind. App. 185, 38 N. E. 872; *Bouscher v. Larkens*, 32 N. Y. S. 305, 84 Hun, 288; *Holley v. Townsend*, 2 Hilt. (N. Y.) 34.

An agency to buy, sell, exchange or lease property is revocable at any time before sale, unless coupled with an interest or given for a valuable consideration, and after his authority has been withdrawn a broker is not entitled to compensation for finding a purchaser. *Brown v. Pfau*, 38 Cal. 550; *Young v. Trainer*, 158 Ill. 428, 42 N. E. 139; *Wilson v. Dyer*, 12 Ind. App. 320, 39 N. E. 163; *Kavanaugh v. Ballard*, 21 Ky. L. R. 1683, 56 S. W. 159; *Cadigan v. Crabtree*, 186 Mass. 7, 70 N. E. 1033, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77, 66 L. R. A. 982; *West v. Dennis*, 128 Mich. 11, 87 N. W. 95; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Kesterson v. Chauvrant* (Mo. App. '02), 70 S. W. 1091; *Green v. Wright*, 36 Mo. App. 298; *Vincent v. Woodland Oil Co.*, 165 Pa. St. 402, 30 A. 991.

Where an agent's authority to sell lands is revoked, and the owner in good faith thereafter sells upon less favorable terms to one who had declined to purchase from the agent, such agent is not entitled to commissions. *Bailey v. Smith*, 103 Ala. 641, 15 S. 900; *Uphof v. Ulrich*, 2 Ill. App. 399; *Blodgett v. Sioux City, etc., R. Co.*, 63 Iowa, 606, 19 N. W. 799; *Gillett v. Corum*, 5 Kan. 608; *Stedman v. Richardson*, 100 Ky. 79, 37 S. W. 259, 18 Ky. L. R. 567; *Beeler v. Cresswell*, 3 Md. 196; *Cadigan v. Crabtree*, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77; *Alden v. Earle*, 4 N. Y. S. 548, 56 Super. Ct. 366; *Mallonee v. Young*, 119 N. C. 549, 26 S. E. 141; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Corse v. Kelly* (Kan. Sup. '09), 101 P. 1016.

A broker who fails to procure a license to carry on his business, in most of the localities where that is required by law, can not recover commissions for acting as such. *Whitfield v. Huling*, 50 Ill. App. 179; *Eckert v. Collot*, 46 Ill. App. 361; *Richardson v. Brix*, 94 Iowa, 626; 63 N. W. 325; *Young v. Denning*, 52 Kan. 629, 35 P. 207; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385; *Johnson v. Hulings*, 103 Pa. St. 498; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Wicks v. Carlisle*, 12

Okla. 337, 72 P. 377; *Saule v. Ryan* (Tenn. Ch. App. '99), 53 S. W. 977; *Costello v. Goldbeck*, 9 Phila. (Pa.) 158.

Where a sub-agent conceals from the principal the fact that he is acting for the agent, the latter can not recover commissions. *Mullen v. Bouden*, 22 Ind. App. 294, 53 N. E. 790.

If a broker employed to sell property, buys it for himself, and does this without the consent of his principal, he is not entitled to commissions. *Finnerty v. Fritz*, 5 Colo. 174; *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Powers v. Black*, 159 Pa. St. 153, 28 A. 133; *Miller v. Holland*, 1 Weekly Notes Cas. (Pa.) 36; *Ryan v. Kahler* (Tex. Civ. App. '98), 46 S. W. 71.

All agreements between a real estate agent or broker and a proposed purchaser touching the subject matter of his employment which are not disclosed to his principal should be scrutinized closely, and if not found compatible with entire integrity and good faith toward his principal, they will defeat the agent's claim for commissions from his principal. *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841.

One employing a broker to sell property, without giving to him the exclusive right to sell, may negotiate a sale himself, and, if he does so without the agency of the broker, and before the latter has procured a purchaser, he is not liable to the broker for commissions, although the broker produced a purchaser after a sale by the owner. *Hill v. Jeff*, 55 Ark. 574, 18 S. W. 1047; *Waterman v. Boltinghouse*, 82 Cal. 659, 23 P. 195; *Dolan v. Scanlan*, 57 Cal. 261; *Doonan v. Ives*, 73 Ga. 295; *Curtis v. Wagner*, 98 Ill. App. 345; *Stewart v. Murray*, 92 Ind. 543; *Buck v. Hogeboom*, 125 Iowa, 526, 90 N. W. 635; *McClave v. Paine*, 49 N. Y. 561; *Brown v. Snyder*, 68 N. Y. S. 224, 57 App. Div. 413; *Chilton v. Butler*, 1 E. D. Smith (N. Y.), 150; *Scherer v. Colwell*, 87 N. Y. S. 490, 43 Misc. 390; *Harris v. Rogers*, 15 N. Y. St. 396; *Evans v. Gay*, 38 Tex. Civ. App. 442, 74 S. W. 575.

Where a broker is instructed by his principal to ascertain the actual rentals of a property sought in exchange, and the agent procures an erroneous statement thereof, although believing it to be true, where the principal relies on it and he con-

tracts to exchange the property, but rescinds the contract on learning the facts, the broker is not entitled to compensation. *Marcus v. Bloomingdale*, 71 N. Y. S. 374, 63 App. Div. 227.

A broker who is unsuccessful in effecting a transaction subject to the approval of his principal, is not entitled to a commission upon a sale subsequently made by another broker. *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218; *Latschaw v. Moore*, 53 Kan. 234, 36 P. 342; *Walton v. N. O., etc., R. Co.*, 23 La. Ann. 398; *Ward v. Fletcher*, 124 Mass. 224; *Donville v. Comstock*, 110 Mich. 693, 69 N. W. 79; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299; *Wilson v. Alexander* (Tex. Sup. '92), 18 S. W. 1057.

Where a broker found a customer to whom the owner sold the property after the termination of the employment, the broker was not entitled to a commission, where the broker found the customer previous to his employment, and the negotiations for the sale were conducted without his aid. *Cushman v. Gori*, 1 Hilt. (N. Y.) 356.

Where a broker is, by agreement, to receive commissions for procuring a purchaser for land only on condition that a sale is made to a certain purchaser, he can not recover if a sale to such purchaser is not consummated, owing to the fault of either of the parties. *Lyle v. Univ. Land, etc., Co.* (Tex. Civ. App. '95), 30 S. W. 723.

Where a vendor employs a broker to effect a sale of land, and, relying wholly on the broker does not exercise his own judgment as to the responsibility of a purchaser found and presented by the broker, but signs a contract of sale, which the purchaser is unable to carry out, the broker is not entitled to compensation. *Butler v. Baker*, 17 R. I. 582, 23 A. 1019. Compare *Wray v. Carpenter*, 16 Colo. 271, 27 P. 248; *Wright v. Brown*, 68 Mo. App. 577; *Brady v. Foster*, 75 N. Y. S. 994, 72 App. Div. 416.

If a broker releases his right to a commission in consideration that the principal would give him further business, the principal's failure to keep his promise does not entitle the broker to recover the original renounced commission; his remedy, if any, is an action on the promise. *Lindt v. Schlitz Brewing Co.*, 113 Iowa, 200, 84 N. W. 1059. See also Sec. 1073.

A real estate broker's contract for commissions for the sale of land which provides that "when said land is sold" he shall have a certain per cent. of the price out of the first money collected, but which fails to give him exclusive authority to sell, does not entitle him to such commission on a sale made by the owner himself. *Tracey v. Abney*, 122 Iowa, 306, 98 N. W. 121.

Defendant agreed to pay plaintiff certain compensation to sell his farm for \$20,000, to be paid as follows: First mortgage \$5,000, second mortgage \$2,500, the balance to defendant in cash; the mortgages were made to secure bonds of defendant. *Held*, that plaintiff did not earn the compensation by the tender of a contract whereby the purchaser agreed to pay that portion of the price represented by the mortgages, "by assuming" these mortgages, in the absence of evidence that the mortgages were not due and could not be paid. *Schultz v. Griffin*, 24 N. E. 480, 121 N. Y. 294.

Where one authorized to sell certain property within a specified time, he to have a certain amount for procuring a purchaser or making a sale, notifies the owner within the time that he has secured a proposition on certain terms, at the price fixed, and the proposition is not accepted, he can not recover the agreed compensation, the customer being one with whom the owners had themselves been in treaty for the property for several months prior thereto, and who had that day made them an offer of the same amount. *Hartley v. Anderson*, 150 Pa. St. 391, 24 A. 675.

Plaintiff claimed that defendant authorized him to sell a ten-acre tract for \$17,000, and that he obtained a purchaser at that price. In an action for the commissions, plaintiff's alleged purchaser testified that plaintiff offered him the land at that price; that he told plaintiff that he would take it, and to get an option on the property; when plaintiff returned and told him that defendant would sell only about nine acres, he told plaintiff to get an option on the best terms he could and he would consider it; an option was obtained on the nine acres but never accepted. Defendant's reason for not selling over nine acres was, that he wanted the balance for a street. Witness testified that he thought defendant intended putting a street through, and that he wanted the option to see if de-

defendant would insist on it. Witness testified that he intended to take the land if he got the whole ten acres for the price named. *Held*, that a verdict should have been directed for defendant, on the ground that plaintiff did not obtain a purchaser. *Hannan v. Fisher*, 82 Mich. 208, 46 N. W. 225.

A provision in a contract employing a broker to procure a purchaser before a certain date, of real estate, stipulated that if the premises were sold after such date on information from him he should receive commissions. The premises were sold subsequent to such date through other brokers for a less price. The purchaser learned that the property was for sale from the owner's attorney advertising the same. There was nothing to show that the broker started the negotiations between the purchaser and owner, nor was there anything to show bad faith on the part of the owner. *Held*, that the broker was not entitled to commissions. *Shipman v. Wilkeson*, 112 N. Y. S. 895.

A real estate broker who expressly contracts to sell and convey for cash is not entitled to commissions by merely securing a competent person for the purchase of the land. *Burnett v. Botts*, 143 Ill. App. 160, affirmed 86 N. E. 258.

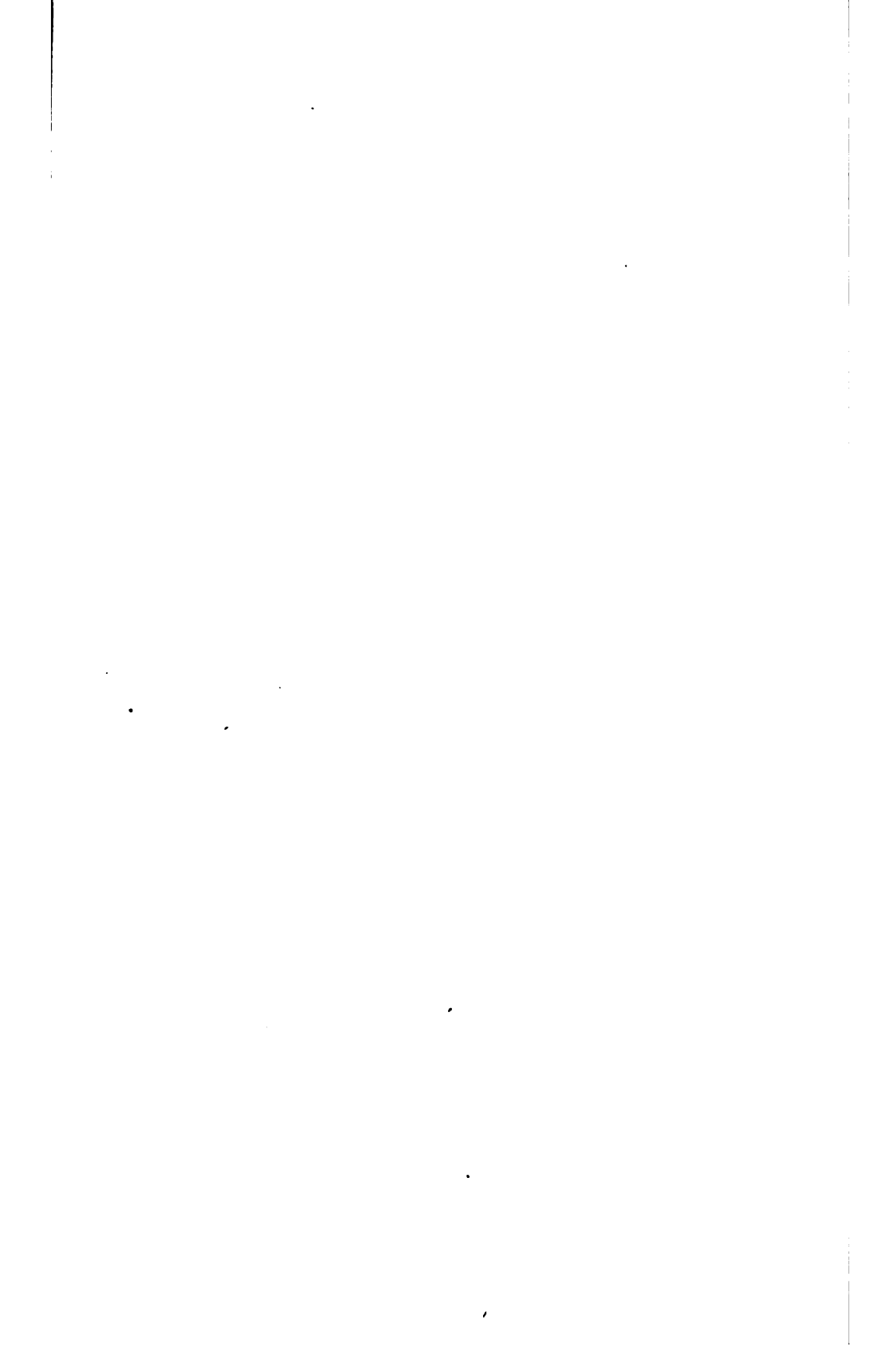
The mere fact that real estate was sold to the person to whom a broker employed to procure a purchaser had five or six months previous to the sale given the information, without informing the owner or doing anything further to effect a sale, was not sufficient to entitle the broker to commissions. *Waters v. Rafalsky*, 119 N. Y. S. 271.

Where a real estate broker, who had been authorized to sell the timber of a tract of land merely informed the purchaser who had been negotiating with the owners for some time in regard to purchasing the land, that he had the land for sale, but did nothing further, and knew nothing of the subsequent negotiation which led up to the sale, which was not made until the vendor agreed that a mill and the down timber would be included, and also agreed to the purchaser's terms as to time of payment, the broker was not the efficient agent in or the procuring cause of the contract so as to entitle him to commissions. *Goff v. Hurst* (Ky. Ct. App. '09), 122 S. W. 148.

Broker held not entitled to commissions for effecting par-

ties to consider an exchange, where they refused to sign the contract therefor. *Reynolds v. Toch*, 121 N. Y. S. 85.

Defendant authorized plaintiff to sell certain property for her at \$40,000. The best offer plaintiff obtained was \$38,000, and the property was subsequently sold by a third person for \$39,000. *Held*, that plaintiff did not produce a party willing, ready and able to purchase on defendant's terms, and could not therefore claim commissions. *Senior v. Fitzgerald*, 119 N. Y. S. 745.



PART V.
PLEADINGS, PRACTICE AND JUDI-
CIAL CONSTRUCTIONS AND
INTERPRETATIONS.

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CHAPTER I.

SECTION.	564. Correspondence.
559. Doctrine of public policy.	565. Advancements.
560. Acquiescence and waiver and effect upon brokers' rights.	566. The borrower.
561. Advertising and advertisements.	567. Acceptances.
562. Accord and satisfaction.	568. Conformity.
563. Breach of contract.	569. Costs.
	570. Conditions precedent to right to commissions.

Sec. 559. Doctrine of public policy.

Plaintiff entered into a contract with defendants whereby he was to have a certain commission for furnishing a purchaser for their mine; he furnished a purchaser, a sale was made, and defendant refused to pay the commission. *Held*, that the fact that plaintiff was employed by the purchasers to manage one of their mines, did not make him their agent in regard to the purchase, and he was not acting as agent for both parties to the contract so as to render his transaction void as against public policy. *Owen v. Matthews*, 123 Mo. App. 463, 100 S. W. 492. See also Sec. 454.

The employment of the same broker by both parties, merely to bring them together, is not against public policy, and he may recover commissions from each. *McLure v. Luke*, 154 Fed. 647. See also Secs. 475, 578.

An agreement between a broker employed to procure a purchaser of real estate and a prospective purchaser binding the broker not to procure any other customer, and binding the purchaser, in consideration thereof, to pay, if he purchases, to the broker, a specified commission, is contrary to public policy, and is not enforceable on the purchaser acquiring the premises. *Rabinowitz v. Pizer*, 108 N. Y. S. 994.

Although one of the principals may have known of the double agency of the broker, and the transaction was advantageous

to said principal, the act is against public policy and bars recovery of commissions. *Conwell v. Smith*, 142 Pa. St. 25, 21 A. 793, 12 L. R. A. 395; *Chapman v. Currie*, 51 Mo. App. 40; *Lightcap v. Nicolai*, 34 Pa. Super. Ct. 189; *Sumner v. Direskiawicz* (Conn. Sup. '09), 74 A. 906. See also Sec. 706a. A contract of the purchaser with the seller's broker to convey to the latter a part of the land bought, is unenforceable as against public policy. *Smith v. Townsend*, 109 Mass. 500.

A broker who is employed to exercise his abilities on behalf of his principal can not, without his principal's knowledge, agree to represent the other party to the transaction; such agreement being contrary to public policy and unenforceable, though the original principal was not injured; the agent intended no wrong, and the other party acted in good faith. *Bass v. Tolbert* (Tex. Civ. App. '08), 112 S. W. 1077.

Where an agent for the sale of land agrees with another, that the latter shall purchase it for their joint benefit, and conceals such sale from his principal, the contract by the purchaser to account to the agent for the profits is violative of law, contrary to public policy, and unlawful, under Civil Code, Section 1067, declaring unlawful that which is contrary to law, public policy, or good morals. *Butler v. Agnew*, 9 Cal. App. 327, 99 P. 395.

A broker employed to procure a purchaser of real estate for a specified sum, on specified terms, for an agreed commission, interested a third person in the premises. The third person requested the broker to do nothing further, but to permit the third person to deal directly with the owner. The third person promised to pay the broker a commission if he purchased. The said third person subsequently purchased the premises from the owner. *Held*, that the broker was entitled to recover from the third person the agreed commission, for the contract did not rest on an immoral consideration, though no notice thereof was given to the owner. *Siegel v. Rosenzweig*, 114 N. Y. S. 179, 129 App. Div. 547.

Any money received by a broker employed to sell land from a purchaser belongs to the principal, since an agent will not be permitted to derive profit from the subject matter beyond his lawful compensation. *Metschan v. Swensson* (Or. Sup. '09), 99 P. 277.

Where a real estate owner fixed his own price on the property and employed a broker to secure an acceptance of his proposition merely, not the best price he could obtain, he can not require the broker to account for money received by him from the broker for the other party on a division of the latter's commissions. *Law v. Ware*, 238 Ill. 360, 87 N. E. 308.

Under an ordinary agency for the sale of land for the highest price possible, it is contrary to public policy for an agent, without the consent of the principal, to accept compensation from the purchaser. *Aikin v. Poffenberger* (Tex. Civ. App. '09), 116 S. W. 615.

Where one engages to negotiate for the purchase of land, and is informed by the principal that he desires to purchase two adjoining tracts to make one property of them, the agent can not negotiate a purchase on his own account of one of the tracts and hold it against the interest of his principal, it being sufficient that he undertook the negotiations and held a situation of trust with reference to procuring the land. *Rogers v. Genung* (N. J. Err. & App. '09), 74 A. 473.

Sec. 560. Acquiescence and waiver, and effect upon broker's rights.

Where the vendor and a proposed purchaser disagree as to the terms of sale, and the broker, who is present, acquiesces in the inability of the parties to complete the contract, and the owner afterward places the property in the hands of another agent, who sells it on practically the same terms to the purchaser secured by the first agent, unless fraud or bad faith be shown, the first broker is not entitled to compensation. *Girardieu v. Gibson*, 122 Ga. 313, 50 S. E. 91.

Where a real estate broker made a contract for the sale of land which contained an agreement that possession should be given in ninety days, and this agreement was beyond his authority, but his principal conveyed the land to the vendees, they accepting an allowance on account of the delay beyond ninety days in giving possession. *Held*, that by making settlement with the principal, the vendees lost their right of action against the brokers because of the breach of an unauthorized agreement. *Hopkins v. Everly*, 150 Pa. St. 117, 24 A. 624, 30 Weekly N. Cases 393.

An owner employed a broker to procure a purchaser and agreed to pay him a commission on the purchaser paying more than a specified sum; a purchaser could not be induced to pay more than that sum; the owner, with the knowledge of the broker, made the sale at the highest price obtainable; there was no secret dealing between the owner and the purchaser, and the broker did not object to the sale. *Held*, that the broker was not entitled to a commission, on the theory that there was a waiver on the part of the owner of the stipulation as to price. *Ball v. Dolan* (S. D. Sup. '08), 114 N. W. 998. See also Sec. 482.

Where M., who was to receive a commission for a sale of B.'s land, turned over the sale of the land to L., agreeing that L. should have the commissions therefor, to which B. consented before a sale was made, L., on selling the land, was not entitled to the commissions as the assignee of M., but because he, with the knowledge and consent of B., sold the land after M. had waived his right to do so. *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775.

Where a written contract employing plaintiff as broker to sell defendant's land provided for a certain cash payment by any purchaser that might be secured and fixed the price at which defendant would sell, refusal by defendant to accept an offer to buy at that price was a waiver of any right which defendant might otherwise have had to require a prospective purchaser to make a tender in cash of the down payment. *McDermott v. Mehoney* (Iowa Sup.), 106 N. W. 925, 115 N. W. 32, 139 Iowa, 292; *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622.

Where a broker is authorized to procure a purchaser of land within a certain time, but the owner waives the performance of the contract within the time agreed and accepts the services of the broker and treats the contract as in force, the broker will be entitled to compensation when he procures a purchaser. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

K. employed land brokers to procure a purchaser for his land; a condition of the employment was that if he sold the land without the intervention or assistance of the brokers they would not be entitled to commissions; K. sold independently of the brokers, although before negotiations were completed the brokers furnished a purchaser. It was held that they had, by the

contract, waived their rights, and were not entitled to a commission. *Robinson v. Kindley*, 36 Kan. 157, 12 Pac. 587.

Where a landlord accepted the waiver of a tenant's privilege of renewal, procured by his agent from the tenant, and acted upon the same, he was estopped to deny the agent's authority in the premises. *Madison Ave. v. Osgood*, 18 N. Y. S. 126.

Where a broker was told by the principal that he must look to the intending purchaser for his compensation, he can not recover his commissions from the principal. *King v. Benson*, 22 Mont. 256, 56 P. 280. Compare Sec. 19.

Under an agreement to pay a broker a commission for procuring a purchaser within a specified time, to earn the commission he must produce within that time a customer ready, able and willing to purchase on the stipulated terms; but the commission is earned if the customer is willing to purchase on different terms, and the variance is waived by the principal, or if a suitable customer is produced, but not within the time limited, owing to a delay caused by the principal, there being no implied promise to pay a commission if, at a time subsequent to the time limit, the property is sold to one introduced by the broker. *Brown v. Mason* (Cal. Sup. '09), 99 P. 867.

Where a broker employed to procure a purchaser attempted, after the expiration of the time fixed for performance, to find a purchaser, and the owner, knowing thereof, made no objection, but encouraged him to proceed, and a purchaser was procured, the owner waived the time limit and the broker was entitled to his commissions. *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134. See also Sec. 42.

Where a principal knows that his agent is representing both parties, it is not necessary to disclose such fact to the principal to entitle him to his commissions. *Arthur v. Porter* (Tex. Civ. App. '09), 116 S. W. 127.

Where a contract declared on and exhibited with the complaint, in an action by a broker for commissions, did not contain a time limit for performance, but referred to a power of attorney executed by the owner to the broker which contained a time limit, and the owner admitted the execution of the contract, but alleged that it was not in force at the time of the

sale, the question whether the contract was in force at that time was in issue, and under it the broker might prove a waiver by the owner of the time limit in the power of attorney. *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134.

A contract provided that certain land should be left with plaintiff for sale for two weeks, and until written notice of withdrawal. The broker failed to sell the land within the two weeks, and verbally acquiesced with the owner that his time to make a sale had expired, and stated that there was no use in destroying the contract, which defendant wanted to do, and neither party acted further thereunder. *Held*, that the broker had waived written notice of withdrawal, thereby terminating the contract at the expiration of the said two weeks. *Bird v. Webber* (Okla. Sup. '09), 101 P. 1052.

The right to recover for services in procuring purchasers for lands was not waived by the fact that after plaintiffs found that defendants did not own or control the land, they demanded a return of the money advanced by the purchasers. *Peavey v. Greer* (Minn. Sup. '09), 121 N. W. 875.

Where a broker performed services towards leasing property, but before he had leased it, he told the owner that he would charge him nothing for his services, he was entitled to no compensation, either for subsequent or the prior services, whether the prior services were rendered without a contract therefor, or under the contract to effect the lease, in which latter case no commission would be earned till the lease was effected. *Strickland v. Fairfax* (Va. Sup. '09), 65 S. E. 477.

The commissions of a broker who acquiesced in the reduction of the price from the original terms is based on the actual price received. *Bauersmith v. Min., etc., Co.*, 146 Fed. 95.

A broker had attempted to exchange defendants' property, and had announced that he expected two and one-half per cent. commission. Less than a week afterward, the deal having fallen through, the broker wrote to defendants: "Now, I have a trade for you and am willing to give you all there is in it," and stated: "I will give you his place clear and \$2,000 cash for your place clear. * * * I would want possession of your place this spring, and you could have possession of the other." The place referred to belonged to the broker's brother in another State,

who wished to move to the residence of the broker, and the broker had no interest in the land, and nothing to give in the transaction other than his commissions. In a subsequent letter the broker said: "I am willing to give you all there is in it, as we would rather have our holdings here," and "should I get the place I would prefer it not rented until my brother comes and decides what he wants to do." *Held*, that the letters showed that the broker was not acting for defendants but was either acting for himself or for his brother and proposed to waive his commissions if the exchange were consummated. *Big Four Realty Co. v. Clark* (Mo. App. '09), 123 S. W. 95.

Sec. 561. Advertising and advertisements.

In a contract to pay for the services of a real estate broker in "showing and advertising" land, the term "advertising" must be construed as meaning the publication of a notice in a newspaper, or otherwise, of the fact that the land is for sale. *Darst v. Doom*, 38 Ill. App. 397.

An advertisement put upon land as for sale by an agent is insufficient to imply power in such agent to make a sale thereof, when the owner denies conferring such power. *Mortimer v. Cornwall*, 1 Hoffm. (N. Y.) Ch. 351. The expenses incurred by a broker in advertising and selling a client's land, are not elements of damages, in an action to recover commissions alleged to have been lost by his client's refusal to convey to the purchasers whom the broker had obtained. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775. See also Sec. 309. A broker's advertisement which brought a purchaser, who bought from the principal, entitled the broker to his commissions. *Kilbourn v. King*, 6 D. C. 310; *Tyler v. Parr*, 52 Mo. 249; *Bell v. Kaiser*, 50 Mo. 150; *Anderson v. Cox*, 16 Neb. 10, 20 N. W. 10; *Kiernan v. Bloom*, 86 N. Y. S. 899, 91 App. Div. 429; *Jackson v. Carrick*, 25 Weekly Not. Cas. (Pa.) 132; *Maboon v. Barrett*, 192 Mass. 552, 78 N. E. 560.

In another case, where a sale was made by the principal to one who derived his information that the farm was for sale from the broker's advertisement, he was denied a recovery of commissions. *Charlton v. Wood*, 11 Heisk. (Tenn.) 19.

A real estate broker suing for commissions may testify that

he advertised the land in a certain newspaper, no effort being made to prove in this manner the terms or contents of the advertisement. *Yarborough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645.

Sec. 562. Accord and satisfaction.

Where there was a *bona fide* contention between a broker and his principal as to whether the broker should be charged with the loss of a certain sum, and the broker retains and uses a check from the principal for the commissions due him, less said loss, expressed to be "in full settlement," an accord and satisfaction is established, which is a valid defense to an action by the broker for the balance of his commissions. *Vorhis v. Elias*, 56 N. Y. S. 134.

Sec. 563. Breach of contract.

If a sale of land by the owner effects a breach of the contract with the agent, an action by the latter should be based on such breach, and not on a performance of the contract. *Metzer v. Wyatt*, 41 Ill. App. 487; *Alderson v. Houston*, 96 P. 884, 154 Cal. 1.

Where a party under a contract is to secure for a second party options on certain properties, and the second party directs him not to proceed with reference to securing an option on one of the properties, this is a breach of the contract for which the second party is liable in damages. *Worthington v. McGarry*, 149 Ala. 251, 42 S. 988. A contract giving an agent the exclusive authority to find a purchaser for a farm within a given time, but not negating the right of the principal to sell the property himself, is not breached by a sale by the owner at public auction, through the medium of an auctioneer acting under his immediate direction. *Ingold v. Symonds*, 134 Iowa, 206, 111 N. W. 802.

The broker's right to a commission is not affected by a subsequent breach by either party not caused through his fault. *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Hannon v. Moran*, 71 Mich. 261, 38 N. W. 909; *Tilton v. James S. Gate Sons Co.* (Wis. Sup. '09), 121 N. W. 331. Where the contract employing a

broker to procure a purchaser stipulates that commissions should be paid only when a sale is effected, the broker is not entitled to commissions unless a sale is effected, though he may be entitled to damages for the wrongful act of the owner in preventing a sale. *McDermott v. Mahoney* (Iowa Sup. '08), 115 N. W. 32, 139 Iowa, 292; *Boddy v. Brummett & Ellis* (Tex. Civ. App. '08), 110 S. W. 532.

A real estate agent who has obtained a purchaser for property placed in his hands to be sold at a certain price, the surplus to go to the agent as his commission, can not recover for a breach of the owner's contract to convey the property a sum paid to the owner to induce him to comply with the contract, in addition to the commission he would have received had the sale been consummated. *Cornell v. Hanna* (Kan. App. '98), 53 P. 790.

Where plaintiff, desiring to purchase a certain tract of land, went to real estate agents, and they informed him they had a letter from the owner in which she offered the tract at \$1,700, and that they would endeavor to procure it for him for \$1,760, \$100 to be paid down, and the balance to be paid as soon as the deed could be procured; but when the owner was informed of the transaction she refused to take less than \$2,000; the real estate agents, having acted in good faith and done all in their power to procure the title of the land, were liable only for the return of the \$100 paid, and not for damages for a breach of the contract. *Kroeger v. Good*, 13 Idaho, 184, 89 P. 632.

In action for damages for revocation of authority to sell land, nothing more than nominal damages can be recovered, where the agent fails to show that he could have made a sale on the principal's terms. *Mulligan v. Owen*, 123 Iowa, 285, 98 N. W. 792.

Where a firm of two members contracted to manage and sell lots of a corporation at a town other than that at which the partners resided, the fact that the business was carried on at the town where the lots are located by only one of the partners, was not a breach of the contract. *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158. See also Sec. 630.

Where an owner who had granted to a real estate broker the exclusive agency for the sale of land for a specified period

sold the timber, which was the most valuable part of the land, and thereby practically prevented the sale of the land according to the terms of the contract, the broker could, without waiting for the expiration of the contract, sue for the breach. *Hunter v. Wenatchee Land Co.*, 97 P. 494, 50 Wash. 438.

Sec. 564. Correspondence.

Where a firm of real estate agents sends a letter to a land owner enclosing their business card and informing him what the business of the firm is, and also inquiring whether the land is in the market and its price, and the owner immediately answers, giving the price of the land, the terms and conditions of sale, and the amount of commissions which he is willing to allow to the real estate agents for selling it, and they immediately commence to act as the agents of the land owner in trying to procure a purchaser of the land, they are his agents, and when they find a purchaser ready to purchase the land upon the terms and conditions prescribed, and sell the land to him, they have earned their commissions. *Stephens v. Scott*, 43 Kan. 285, 23 P. 555; *Imperato v. Wasboe*, 93 N. Y. S. 489; *Rodman v. Manning* (Or. Sup. '09) 99 P. 657, 1135; *Ispharding v. Wolf*, 36 Ind. App. 250, 75 N. E. 598; *Getzilsohn v. Donnell*, 98 N. Y. S. 213, 56 Misc. 164; *Montgomery v. Amster*, (Tex. C. A. '09) 122 S. W. 307; a person dealing with a real estate agent, with knowledge that the agent's authority rests on correspondence between him and his principal, must ascertain the extent of the agent's authority, and is bound by the restrictions thereof; *Strong v. Ross*, 33 Ind. App. 586, 71 N. E. 918. Real estate brokers wrote the owner of a lot that they had a customer therefor at a price named, and asked for an answer, and in reply to the owner's answer asked his lowest price and stated that they had a client for the lot; the owner answered naming his price, to which the brokers replied that their client deemed the price too high, but subsequently wrote that they were working to get him up to the owner's price, on condition that a second mortgage be paid off, and asked the owner to come to the city; the owner did not answer the letter nor come to the city, but the brokers again wrote that their client would pay the owner's price over existing mortgages, to which the owner answered accepting, providing that they did business at

once, whereupon the brokers telegraphed or wrote the owner to come to their office on a day stated, but this the owner did not do. *Held*, not to constitute a contract of employment. *Lotz v. Levy*, 104 N. Y. S. 1058, 120 App. Div. 477. Correspondence between defendant and the owner respecting defendant's authority and the nature of his dealings with the owner was admissible, not as declarations of third persons against plaintiff, but as tending to show the authority given defendant by the owner, and what he did thereunder. *Wefel v. Stillman* (151 Ala. 249), 44 S. 203. On the issue as to whether a loan broker was the agent of the defendant in negotiating a loan for him, or the agent of plaintiff company which made the loan, correspondence between the broker and the plaintiff's manager, relative to defendant's loan and the requested extensions thereof, and concerning other loans made by plaintiff through the broker, is admissible in evidence, and the question is for the jury. *Jesson v. Texas Land & Loan Co.* 3 Tex. Civ. App. 25, 21 S. W. 624; *Holliday v. McWilliams*, 76 Neb. 324, 107 N. W., 578; *Bradley v. Bower* (Neb. Sup. '04), 99 N. W. 490.

Sec. 565. Advances.

The fact that a broker employed to sell land advanced the price to the purchaser did not make him the purchaser's agent. *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Lawson v. Thompson*, 10 Utah, 462, 37 P. 732. A broker negotiated a sale of plaintiff's land to defendant, but had the deed made out to a third person, who afterwards conveyed to defendant; a few weeks after the sale the defendant agreed to let the broker sell the land for him at an advance, the profits to be equally divided between them; plaintiff did not know at the time of the sale that defendant was the purchaser, and there was then no arrangement or understanding between defendant and the broker as to any resale of the property or division of the profits. *Held*, that there was nothing in the transaction in fraud of plaintiff. *Glover v. Layton*, 145 Ill. 92, 34 N. E. 53.

Sec. 566. The borrower.

A company which is to receive a commission from the borrower for procuring a loan, and which makes out all the papers without

knowing from whom the loan is to be obtained, and before submitting them to the lender, is the agent of the borrower in procuring the loan. *Land Mtge. etc. Co. v. Preston*, 119 Ala. 290, 24 S. 707; *Hammill v. American, etc. Mtge. Co.*, 127 Ala. 90, 28 S. 558. A broker who negotiated a loan and received his commissions from the borrower, taking a note payable at his office to the lender, is not authorized to receive payments on such note. *Englerd v. White*, 92 Iowa, 97, 60 N. W. 224. See also Secs. 255 and 257.

Sec. 567. Acceptances.

Where one wrote across a draft "accepted" in the name of his principal, by himself as agent, but which acceptance, though authorized in fact, did not in law bind the principal, it was held that unless the agent used the name of his principal without authority in fact, he could not be held personally bound. *Walker v. Bank of State of N. Y.*, 5 Seld. (N. Y.) 582; *Duncan v. Niles*, 32 Ill. 532. Where defendant wrote plaintiff offering to pay him ten per cent. commissions for sales of land made for defendant at a specified price to persons obtained by plaintiff that defendant had no agreement with, and plaintiff immediately began to search for purchasers whom he succeeded in procuring, his acts constituted a sufficient acceptance of the offer. *Brown v. Smith*, 113 Mo. App. 59, 87 S. W. 556. The performance of work by real estate agents in pursuance of an employment to sell land, when at once brought home to the knowledge of their employer, is an acceptance of the contract of employment. *Arnold v. Nat. Bk. of Waupaca*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. N. S. 385. When a party submits to another, through the mail, a proposition of purchase or sale, the receiver of the proposition has the right, within a reasonable time and before it is withdrawn, to accept by a writing deposited in the postoffice, duly stamped, ready for carriage and delivery, and such an acceptance binds the proposer of the contract from the time the deposit is made in the postoffice, whether it be delivered or not. *Scottish American Mtge. Co. v. Davis*, 96 Tex. 504, 74 S. W. 17, 18. Where an owner of real estate asks a real estate broker "to get a deal," it is not necessary for the real estate broker to assent in words, if he procures a purchaser he makes a contract by performance.

Lamb v. Prettyman, 33 Pa. Super. Ct. 190. Where defendant sent to plaintiff a power of attorney for the sale by him as agent of defendant's real estate, if an acceptance was necessary it was accepted by a letter from plaintiff stating that he had a buyer for the place and that he would leave on a day named with him, for the purpose of looking through the property. *Luckett Land & Em. Co. v. Brown*, 118 La. 943, 43 S. 628.

The mere approval of a contract by a broker, where it substantially differs from that which he was employed to make, can not of itself be held to be an acceptance of performance of the broker's obligations. *Reiger v. Biggs*, 29 Mo. App. 421.

In an action by the grantor of realty to set aside a sale, on the ground that the agent employed by her to procure a purchaser, in fact purchased the property, while she thought the sale was being made to another, it appeared that the agent had induced her to sign a contract of purchase with such other party, the agent agreeing to execute with the other a bond accompanying a mortgage which was to be given to the grantor; subsequently a deed was given running to the agent; the bond was signed by the agent and the other, and the mortgage, signed by the agent alone, was kept by him for the purpose of record; after the grantor learned that the deed ran to the agent she informed him, on the payment of the interest on the purchase money mortgage given by him, that she would put the money in bank until she got her property back, and stated that she was going to see a lawyer. *Held*, that the acceptance of the money did not constitute a ratification of the transaction. *Clark v. Bird*, 72 N. Y. S. 769, 66 App. Div. 284. See also Secs. 458, 618.

Sec. 568. Conformity.

Where the owner, on being informed by the broker that he has sold the land refuses to convey, without objecting to all the terms of the sale, such conduct is some evidence that the sale conformed to the directions given to the broker. *Smith v. Keller*, 151 Ill. 518, 38 N. E. 250.

Sec. 569. Costs.

Where plaintiff, when she sued to compel specific performance of a contract to convey land, made by defendant with her as-

signor, knew who owned the property at the time the defendant undertook to contract for its conveyance, and that the contract was worthless, she was unable to recover the costs incurred in litigation, in an action on defendant's warranty of authority as agent to sell. *Rowland v. Hall*, 106 N. Y. S. 55, 121 App. Div. 459.

Sec. 570. Conditions precedent to right to commissions.

A proviso in a broker's contract that commission shall be payable out of the first cash payment is not a condition precedent to the broker's right to recover his commissions, and does not mean that unless there is a cash payment there are to be no commissions. *Finch v. Guardian Trust Co.*, 92 Mo. App. 263. *Hanna v. Espalla* (148 Ala. 313), 42 S. 443. See also Sec. 501.

The principal agreed to pay the broker's commissions for selling land when the vendees paid a certain sum and gave their notes and mortgage for the balance. The vendees executed their note, but never paid the money. The broker was not entitled to commissions. *McPhail v. Buell*, 87 Cal. 115, 25 P. 266; *Ormsby v. Graham*, 123 Iowa. 202, 98 N. W. 724.

Where a contract of employment makes the right to a commission dependent upon the payment of the purchase price, the broker can not recover until the transaction is finally consummated. *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *West v. Stoeckel*, 6 Ohio Dec. (Rep.) 1082, 10 Am. L. Rec. 309.

Where, in an action by a broker for commissions for selling land, plaintiff relied on a written agreement by which payment of commissions was to be made, "one-half when the second payment of building loan is due and payable, and the balance immediately after inclosure payment is due and made," these two events were conditions precedent to plaintiff's right to recover, and should have been pleaded and proved on the trial. *Turner v. Lane*, 93 N. Y. S. 1083, 47 Misc. 387; *Jaupal v. Gold*, 106 N. Y. S. 891, 122 App. Div. 401.

Where a broker agrees to sell land upon condition that the owner shall first make \$500 out of the sale, the broker to have the rest as his commission, he is not entitled to a commission for merely finding a purchaser, upon the sale to such purchaser falling through on account of a defect in the title. *Seattle Land*

Co. v. Day, 2 Wash. 451, 27 P. 74; *Hess v. Eggers*, 78 N. Y. S. 1119, 38 Misc. 726, affirming 76 N. Y. S. 980, 37 Misc. 845. *Contra*, *Putzel v. Wilson*, 2 N. Y. S. 47, 49 Hun, 220.

A stipulation that the principal is to pay the broker a certain commission for negotiating a loan, when made, and the loan fails by reason of a defective title, does not make the right to a commission dependent on the making of the loan. *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000. See also Sec. 501.

Where a broker's contract for commission provided that the amount sued for was payable out of the last cash payment, such payment constituted a condition precedent to any liability on defendant's part to pay such sum to plaintiff, and hence an allegation in plaintiff's complaint that the sum sued for "became due" on a given date, was not a sufficient allegation that the condition precedent had happened. *Nekarda v. Presberger*, 107 N. Y. S. 897, 123 App. Div. 418.

If the right to a commission is dependent on payment of the price by the purchaser, the broker must show either payment or a tender thereof. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Fisk v. Soule*, 87 Cal. 313, 25 P. 430. Under a contract providing for the payment of commissions "at the time of the payment by said purchaser," the broker was entitled to a commission on a partial payment, payment of commissions not being dependent on the payment of the entire purchase price, though the principal, a part owner, received no part of the said payment. *Frank v. Bonnevie*, 20 Colo. App. 164, 77 P. 363. See also Secs. 297, 470.

Where land is sold for a price payable in installments, and the commission is to be paid as each installment is received, if the purchaser defaults after making certain payments, and the land is sold at judicial sale, and bought in by the principal in full satisfaction of the price, the broker is entitled to full commissions. *Crane v. Eddy*, 191 Ill. 645, 61 N. E. 431, 85 Am. St. R. 284.

Where the parties were familiar with the facts, and defendants were notified that plaintiffs would claim their commissions, a demand before suit was unnecessary. *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23. In some contracts the delivery of the deed is made a condition precedent to the broker's being

entitled to his commissions. *Beebe v. Roberts*, 3 E. D. Smith (N. Y.), 194. See also Sec. 536.

Where an authorized agent agreed to sell land, subject to the approval of the owners, the approval of the owners was necessary to constitute a contract enforceable by either party, as the purchaser was not bound to accept the conveyance of an interest of only one owner. *Jacobson v. Hendricks* (Conn. Sup. '10), 75 A. 85.

CHAPTER II.

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Sec. 571. Courts.

Contracts with brokers for the sale of real property are presumptively entered into in good faith, and it is the province of the courts, in administering the law as to such contracts, to carefully protect the interests of the parties according to the true spirit and meaning of the contracts. *Corder v. O'Neill*, 176 Mo. 401, 75 S. W. 764. Where two parties make a parol contract, and they disagree about its terms, it is the duty of the court, in an action arising thereon, to explain to the jury, when requested, the legal effect of each party's recollection of the terms of the same. *Stewart v. Fowler*, 37 Kan. 677, 15 P. 918.

Sec. 572. Equity.

A court of equity will not enforce against the owner of land a contract of sale made by his agent under authority given six years before, where the land has greatly appreciated in

value meantime, and the agent, without advising his principal of such fact, made the sale for a price grossly inadequate at the time, though within the terms of the original authority. *Hall v. Gambrill*, 92 Fed. 32, 34 C. C. A. 190; *Proudfoot v. Wightman*, 78 Ill. 553.

A broker procured to be made to himself a deed of land which he was employed to sell, the grantor intending it only as a means of carrying into effect a supposed sale to a third party, but the grantee described intended to obtain the land to his own use, and also fraudulently misrepresented the value of the consideration, which consisted of certificates of stock in mining companies. *Held*, that the deed was not void, but only voidable, on either ground, and that if the grantor, who soon learned the facts entitling him to a reconveyance, neglected for more than two years to do any act to avoid it, and exchanged the stocks for other stocks, he must be taken to have ratified the conveyance, and could not maintain a writ of entry to recover the land. *Bassett v. Brown*, 105 Mass. 551. Compare Sec. 321.

An agent sold land of his principal and took a note for the purchase money in the name of himself and his principal, and assigned it to C., who sued thereon in the names of the payees for his use and recovered judgment. *Held*, that the assignment by the agent passed no interest of his principal, and that equity would relieve against the judgment. *Wright v. Ray*, 3 Humphrey (Tenn.), 68.

Where defendant obtained authority from plaintiff to sell timber for the latter, and procured purchasers at the price named by plaintiff, but represented to plaintiff that he made the sale at a much less price, and could not get the price named by plaintiff, and thus induced plaintiff to convey the timber to the purchasers at the less price and appropriated the balance paid for the timber by the purchasers to himself, under a secret agreement with them, the transaction was a fraud on plaintiff, and he was entitled to equitable relief. *Lee v. Pattillo*, 105 Va. 10, 52 S. E. 696.

In an action for the breach of a contract to pay a broker a specific amount for procuring a loan on defendant's property, where defendant's refusal to accept the loan was shown,

defendant may prove that the broker had agreed to pay the lender a bonus of a specified per cent. of his commission, to show the amount the broker was entitled to recover, on the equitable principle that the recovery must be confined to the actual loss. *Finck v. Pierce*, 103 N. Y. S. 765, 53 Misc. 554; *Gatling v. Central Spar Verein*, 73 N. Y. S. 765, 55 Misc. 554; *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055, 13 D. L. N. 853; *Duncan v. Borden*, 13 Colo. App. 481, 59 P. 60. See also Secs. 1070, 1078.

Defendant, a real estate agent, submitted to his non-resident principal an offer for certain real estate, made by a person in his employ, without stating this fact, at a time when values were rapidly appreciating, which offer was accepted by plaintiff. The alleged purchaser, finding himself unable to raise the money, conveyed to defendant, who assumed the former's liability. *Held*, that the conveyance would not be cancelled in the absence of proof that defendant intended to purchase his principal's property in the name of another. *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549.

Where agents of the owner of land in contracting to sell it exceeded their authority by extending the time within which the purchaser could make a cash payment, and by receiving a sum to be held for the principal as a forfeit or payment on the purchase price, the purchaser was not entitled to specific performance of the contract. *Shirley v. Coffin* (Tex. Civ. App. '09), 121 S. W. 181.

Defendant M., representing that he owned or controlled certain mining claims, employed plaintiff to procure capital to purchase and operate them, whereupon complainant procured defendant L. to advance money, under a contract between M. and L. for the conveyance of the claims to a corporation which they formed, it being agreed that a portion of the stock should be issued to M. in consideration of a transfer of the claims to the corporation, and that a portion of M.'s stock so issued should be transferred to L., in payment for the money which he advanced, both M. and L. agreeing that the plaintiff should receive \$50,000 of such stock for his commissions. M. in fact never purchased or conveyed any claims to the corporation with money furnished by L., but squandered such money, and

no stock was issued to him therefor. *Held*, that, while complainant, under such facts, had a cause of action at law for his services against M. & L., he could not maintain a bill in equity against the corporation, or either M. or L. to compel a transfer of \$50,000 of the corporation's stock to him. *Also held*, that specific performance of M.'s agreement to convey the mining claims to the corporation could not be decreed, as it did not appear that M. had title thereto, but the contrary; and that neither Martin, nor Ryan, nor Lewis had equitable title to the stock, which belonged to the company. *Ryan v. Martin*, 165 F. 765.

A vendor of land who has been compelled by a decree avoiding the sale to repay the commissions paid directly to the agent by the purchaser as a part of the consideration, being entitled to recover them from the agent in *assumpsit*, is not entitled to relief in equity by subrogation to the rights which the purchaser had, but did not urge against the agent. *Volker v. Fisk* (N. J. Eq. '09), 72 A. 1011.

Sec. 573. Exceptions.

Where an agent in making a sale of real estate has acted as agent for the vendor as well as the vendee, he can not recover commissions from the vendee, unless he brings the case within one of the established exceptions to the general rule that an agent can not recover commissions from both parties to the transaction. *Bunn v. Kerch*, 214 Ill. 259, 73 N. E. 419.

Sec. 574. Forgery.

The treasurer of a charitable corporation, without authority, took railroad bonds registered in the name of the corporation, to a broker for sale; the broker refused to handle the bonds unless they were made transferable to bearer by the legal transfer agent of the railroad; the transfer agent required from the corporation a copy of a resolution of its directors authorizing the transfer and a power of attorney to make it; the treasurer drew up a resolution of authority and forged thereto the signatures of the officers and the seal of the corporation, and also forged a power of attorney; the transfer agent thereupon, in good faith, made the transfer, and the

broker sold the bonds *Held*, that the broker and the railroad company were liable to the corporation for the value of the bonds, though both acted in good faith, and the corporation may recover from either. *Jennie Clarkson Home for Children v. R. R. Co.*, 87 N. Y. S. 348, 1137, 1138, 92 A. D. 491, 618, 617, 182 N. Y. 47, 507, 74 N. E. 571, 1118, 70 L. R. A. 787. Compare Sec. 351.

Ordinarily, however, brokers are not personally liable for loss on a forged note sold by them, where they advised the vendee at the sale that they were acting as agents and disclosed their principal. *Bailey v. Galbreath*, 100 Tenn. 599, 47 S. W. 84.

Sec. 575. Loan payable in gold.

Where plaintiffs were employed by defendants to procure for them a loan on a mortgage on land, and the loan was not made solely because the lender found insisted on a clause in the mortgage that the principal and interest should be paid in gold; the plaintiffs did not perform the contract and are not entitled to compensation, since the contract meant a loan to be paid in lawful money, and the mortgage loan could not be paid in but one kind of money. *Caston v. Quimby*, 178 Mass. 153, 59 N. E. 653.

Sec. 576. Licenses.

In the absence of evidence to the contrary, that the plaintiff was licensed to act as a broker will always be presumed. *Munson v. Fenno*, 87 Ill. App. 655; *Shapler v. Scott*, 85 Pa. St. 329.

It is the rule in most jurisdictions that a broker who fails to procure a license to carry on his business, as required by law, is barred recovery of commissions for acting as broker. *Whitfield v. Huling*, 50 Ill. App. 179; *Eckert v. Collot*, 46 Ill. App. 361; *Reeder v. Jones* (Del. Super. '02), 65 A. 571; *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Yount v. Denning*, 52 Kan. 629, 35 P. 207; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385; *Wicks v. Carlisle*, 12 Okla. 337, 72 P. 377; *Johnson v. Hulings*, 103 Pa. St. 498; *Coles v. Meade*, 5 Pa. Super. Ct. 334; *Costello v. Goldbeck*, 9 Phila. (Pa.) 158; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Saule v. Ryan* (Tenn. Ch.

App. '99), 53 S. W. 977; *Pile v. Carpenter*, 118 Tenn. 288, 99 S. W. 360.

In some of the States the courts allow the recovery of commissions by an unlicensed broker, upon the ground that the license laws are enacted purely as revenue measures, and have no effect on the rights of the parties *inter se*. *Houston v. Bogani*, McGloin (La.), 164; *Walker v. Baldwin*, 103 Md. 352, 63 A. 362; *Tooker v. Duckworth*, 107 Mo. App. 231, 80 S. W. 963; *Prince v. Eighth St. Baptist Ch.*, 20 Mo. App. 332; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Amato v. Dreyfus* (Tex. Civ. App. '96), 34 S. W. 450; *Watkins Ld. Mtge. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72; *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195; *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134.

The fact that a real estate agent had a license at the time of the action to recover commissions, does not raise a presumption that he had a license two years before at the time of the transaction. *Eckert v. Collet*, 46 Ill. App. 361.

One who, while engaged in other business, sells land for another, may recover his commissions, though he had not taken out a license as required of real estate agents, since a single sale does not constitute the exercise of the business of real estate brokerage. *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124; *Roeder v. Butler*, 19 Pa. Sup. Ct. 604; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Pope v. Beale*, 108 Mass. 561; *Packer v. Sheppard*, 127 Ill. App. 598. *Infra*.

The fact that the agent had taken out no license as a real estate agent under the internal revenue law of the United States will not affect his right to recover compensation; the sole object of that law in requiring real estate agents to take out licenses was to raise revenue; the question in such case is, whether the statute was intended as a protective measure or merely as a fiscal expedient; whether the Legislature intended to prohibit the act unless done by a qualified person, or merely, that the person who did it should pay a license fee; if the latter, the act is not illegal. *Ruckman v. Bergholz*, 37 N. J. L. 437.

A trust company incorporated in Pennsylvania, under an act of the Legislature, and authorized to buy and sell real estate, is not liable as a real estate broker for the license tax

imposed on any individual or corporation. *Commonwealth v. Real Estate Trust Co.*, 211 Pa. St. 51, 60 A. 551; *Manke v. Tinch*, 98 P. 792 (Kan. Sup. '08).

An auction sale of real property does not make the one negotiating such sale a broker within the meaning of the license act. *Yedinsky v. Strouse*, 6 Pa. Super. Ct. 587, 42 Week. Not. Cas. 12. A receipt for license from the State Treasurer is not such a license as authorizes a real estate broker to act so as to relieve himself from penalties, and to enable him to recover commissions. *Jadwin v. Hurley*, 10 Pa. Super. Ct. 104.

Unless it clearly appears that the Legislature intended more, it will be held that the penalty imposed by the act on a real estate agent selling property on commission, without a license, excludes all others. *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195; *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384. A person who sells property for another under a special contract, without holding himself out to be a real estate broker, may recover though he has not complied with the act requiring real estate brokers to take out a license. *Black v. Snook*, 204 Pa. St. 119, 53 A. 648; *Yedinsky v. Strouse*, 6 Pa. Super. Ct. 587, 42 W. Not. Cas. 12. *Supra*. Also Sec. 604.

Where a resident of New Jersey contracts with a real estate broker in Pennsylvania to sell real estate situate in New Jersey, he is not required to have a real estate broker's license under the Pennsylvania statute, to make his contract valid. *Callaway v. Prettyman*, 218 Pa. St. 293, 67 A. 418. In an action to recover commissions on a sale or exchange of real estate, where the plaintiff describes himself in his statement of claim as a dealer in real and personal property, and in the regular course of business made the sale or exchange in question, and it is admitted that plaintiff had not taken out a license, as required by law, the statement of claim is admissible as evidence tending to show that the plaintiff is a real estate broker, and when the statement is supported by the evidence of two witnesses called by the defendant, it is error for the court to give binding instructions for plaintiff. *Sprague v. Reilly*, 34 Pa. Super. Ct. 332.

If a broker was duly licensed at the time he completed the negotiations for a sale of real estate, by which the purchaser

leased the same with an option to purchase, the fact that the broker was not licensed at the time the purchaser elected to exercise such option was no defense to the broker's claim for commissions. *Coates v. Locust Point Co.*, 102 Md. 291, 62 A. 625.

If it does not appear from the evidence that plaintiff was licensed to engage in or carry on the business of a real estate broker in the State where the contract is alleged to have been made, the defendant would not be entitled for this reason to a verdict, if there is nothing in the evidence to show that a real estate broker is required, under the law of that State, to have a license in order to carry on the business, and there is no averment in the pleadings that the plaintiff was acting as a licensed real estate broker in the transaction of the business in question. *Richards v. Richman*, 5 Penne. (Del.) 558, 64 A. 238.

Sec. 577. Limitations and restrictions.

Where the contract of employment limits the same to the sale of certain property, it must be made to appear that the property sold was within the description. *Maze v. Gordon*, 96 Cal. 61, 30 P. 962. Where a broker is, by agreement, to receive commissions for procuring a purchaser for land only on condition that a sale is made to a certain person, he can not recover if a sale to such purchaser is not consummated, owing to the fault of either of the parties. *Lyle v. Uni. Land, etc., Co.* (Tex. Civ. App. '95), 30 S. W. 723. Compare Secs. 526 and 527. A qualification of a broker's right to commissions for a sale of property, that, "if sold to a party sent by Mr. Rapp all this week, then no commission is to be paid; also, A. Ozias," limits the time within which a sale to such persons might be made without payment of commissions, to "this week." *Gaty v. Clark*, 28 Mo. App. 332; *Smith v. Tate*, 82 Va. 657.

Sec. 578. Broker acting as a mere middleman.

If the broker acts as a mere middleman, and finds a purchaser at the price fixed, it is immaterial that each party to the transaction was ignorant of the broker's employment by the other party. *Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916. A broker whose undertaking is merely to find a purchaser at

a price fixed, or at a price satisfactory to the seller, is, in reality, only a middleman, whose duty is performed when the buyer and seller are brought together. *Johnson v. Hayward*, 77 Neb. 35, 107 N. W. 384, 5 L. R. A. N.S. 112. Compare *Harten v. Loeffler*, 31 App. D. C. 362.

In an action to recover a commission for services rendered as a middleman in bringing the parties together to make an exchange of property, evidence held to show that plaintiff was an active broker representing the party with whom defendant made the exchange, and was not a mere middleman who simply brought the parties together and permitted them to make their own trade, and was consequently not permitted to recover commissions from defendant. *Pinch v. Morford*, 142 Mich. 63, 105 N. W. 22. Under a petition alleging defendant's employment of plaintiff as a broker, in effecting a sale of property for defendant, plaintiff can not recover on proof of services as a mere middleman. *Southack v. Lane*, 65 N. Y. S. 629, 32 Misc. 141.

A broker who acts as a middleman to effect a purchase and sale of property, represents both the purchaser and the seller and is the common agent of both. *Colvin v. Williams*, 3 Harr. & J. (Md.) 38.

To a certain extent and for certain purposes, by the understanding and usages of business and the nature of his employment, a broker is authorized to act for both parties. But what he does in that relation he does as an indifferent person and not in the interest of either party. Every one who employs him is presumed to know and consent that to that extent and for such purposes he may so act. But beyond that he has no right to engage in the interests of the other party, without the actual knowledge and consent of his principal. Even custom or usage will not be allowed to extend the right to act for and receive commissions from both parties to matters where the interests of the parties are or may be diverse. *Walker v. Osgood*, 98 Mass. 348. Compare Sec. 475.

Sec. 579. Unless mistake be pleaded and proved each purchaser bound for the whole commission.

Where a title bond is executed to several joint purchasers, each is bound for the whole commission payable to one who

has assisted them in making the purchase, unless a mistake in the writing is pleaded and proved. *Schomberg v. Anxier*, 101 Ky. 292, 19 Ky. L. R. 548, 40 S. W. 911; *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23.

Sec. 580. Notice immediate¹—terminating agency means in a reasonable time.

Where the contract was that if defendant by himself or through any of his agents sold the property, defendant was to give plaintiff immediate notice of that fact, the meaning, taken in connection with the admitted facts, was an actual sale and binding agreement on the finding of a purchaser by another agent than plaintiff, ready, willing and able to buy, of which fact defendant had notice, immediate notice required by the contract being notice within a reasonable time, taking into consideration the situation of the parties and all the surrounding circumstances. *Tuffree v. Bienford*, 130 Iowa, 532, 107 N. W. 425.

Sec. 581. Principal may remain neutral as to the claims of several brokers.

Where several brokers are openly employed to sell real property, the entire duty of the seller is performed by remaining neutral between them and he has a right to make the sale to a buyer produced by any of them without being called upon to decide between these several brokers as to which of them was the procuring cause of the purchase. *Vreeland v. Vatterlein*, 33 N. J. L. 247, criticizing *Eggleston v. Austin*, 27 Kan. 245; *Scott v. Lloyd*, 19 Colo. 401, 35 P. 733; *Witherbee v. Walker*, 42 Colo. 1, 93 P. 1118; *Dreyer v. Rauch*, 42 How. Pr. (N. Y.) 22, 3 Daly, 434; *Martin v. Billings*, 2 City Ct. R. (N. Y.) 86; *Jennings v. Trummer*, 96 P. 874, 52 Oregon, 149; *Frinck v. Gilbert* (Wash. Sup. '09), 101 P. 1088. Compare Secs. 291, 446.

Where the owner lists property with several brokers for sale, he occupies a neutral position, being only interested in the result, and can sell and pay the commission to the first broker who presents a customer who is ready and willing to purchase. *Frink v. Gilbert* (Wash. Sup. '09), 101 P. 1088.

Sec. 582. A proposition is not proved until inconsistent with the negative.

Upon an issue whether the owner of real estate during the continuance of an option given upon it, offered to sell it to another party at less than the option price, a statement made by such party to a witness that such an offer had been made to him is not admissible evidence against the owner; it is mere hearsay; the fact that during the continuance of the option the owner bargains the property to a third party, but contingent upon the failure of the option holder to comply with the terms of his option, does not alone constitute a breach of the option by the owner; upon the issue whether the owner during the continuance of the option dissuaded a possible customer of the option holder from purchasing from him, evidence that the owner and the customer had several interviews, and, after the termination of the option, entered into a contract relative to the land, does not alone prove dissuasion by the owner; the customer may nevertheless have first of his own notion, abandoned the option holder, and then have sought to persuade the reluctant owner; the affirmative of such an issue is not sustained so long as the evidence merely justifies suspicions or surmises, or so long as the negative may, after all, be consistent with the evidential facts; a proposition is not proved until the evidence becomes inconsistent with the negative. *Smith v. Lawrence*, 98 Me. 92, 56 A. 455.

Sec. 583. Parol contract entered into by agent in his own name binds unnamed principal.

An agent can, by parol contract entered into in his own name, bind a principal whose name does not appear in the instrument executed in pursuance thereof. So held, in an action by executors to recover rent upon a lease not under seal, the copy adduced being signed by the lessee only, and the plaintiffs being described therein as landlords, with the word "agents" after their names. *Nicoll v. Burke*, 45 N. Y. Super. Ct. 75.

Sec. 584. Contract of broker to share in profits for making sales not a partnership.

Where a real estate agent has a written contract with the owner of land to put it upon the market, advertise and sell the

same, having for his interest only a share in the surplus profits arising from the proceeds of the sale of the land, it is a contract of agency and not of partnership. *Durkee v. Gunn*, 41 Kan. 496, 21 P. 637; *Hicks v. Post*, 154 Cal. 22, 96 P. 878. Compare *Seattle Land Co. v. Day*, 2 Wash. 451, 27 P. 74.

Sec. 585. Contract to pay broker a commission on withdrawing land from sale strictly construed.

A provision in a real estate broker's contract for commissions for a sale of land, that the owner might withdraw the land from the market or raise the price on paying to the broker two per cent. of the price stipulated, is penal in character and must be strictly construed. *Tracey v. Abney*, 122 Iowa, 306, 98 N. W. 121. Compare Secs. 132, 552.

Sec. 586. In trying to effect a sale of real estate party has the right to extravagantly extol.

A party in trying to effect a sale has the legal right to puff the property in the most extravagant manner and exalt its value to the highest point his antagonist's credulity will bear. *Tuck v. Downing*, 76 Ill. 71.

CHAPTER III.

SECTION.

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Sec. 537. Quantum meruit.

If plaintiff declares on an express contract, but fails to prove it, in most jurisdictions he is not entitled to recover on a *quantum meruit*. *Emery v. Atlanta R. E. Ex.*, 88 Ga. 321, 14 S. E. 556; *Hammers v. Merrick*, 42 Kan. 32, 21 P. 783; *McDonald v. Orman*, 98 Mich. 40, 56 N. W. 1055; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299; *McDonnell v. Stevenson*, 104 Mo. App. 191, 77 S. W. 766; *Veatch v. Norman*, 109 Mo. App. 387, 84 S. W. 350; *Dorrington v. Powell*, 52 Neb. 440, 72 N. W. 587; *Edwards v. Goldsmith*, 16 Pa. St. 43; *Thornton v. Stevenson* (Tex. Civ. App. '95), 21 S. W. 232; *Oliver v. Morawitz*, 95 Wis. 1, 69 N. W. 977; *Green v. Mules*, 30 L. J. C. Pl. (Eng.) 343. Compare Sec. 639.

It has been held that on a petition to recover an alleged agreed compensation for services as broker, a recovery may be had on proof of the reasonable value of the services, and the variance may be disregarded unless it appears that defendant was misled. *Susdorf v. Schmidt*, 55 N. Y. 319; *Close v. Brown*, 230 Ill. 228, 82 N. E. 629; *Gregg v. Loomis*, 22 Neb. 174, 34 N. W. 355.

Where no agreement as to compensation was made between the owner of property and the broker employed by him to make a sale thereof, the broker, on procuring a purchaser, could recover on a *quantum meruit* for his services in making the sale at the price he did, though the principal had previously revoked the agency by selling the property without the broker's knowledge, and not merely compensation for his services up to the time of the revocation of the agency. *Reams v. Wilson*, 147 N. C. 304, 60 S. E. 1124. Compare Sec. 15.

Under a contract to make one the sole agent to sell lots at a commission "which shall be in full for any services he may render in surveying and laying out the land," the agent can not, having made no sales, recover on a *quantum meruit* for the services. *Gilbert v. Judson*, 85 Cal. 105.

Though a contract for a broker's services is required by the Code to be in writing, subscribed by the party to be charged, or his agent, in order to be valid, such fact does not preclude a recovery on complete performance on a *quantum meruit*. *Blankenship v. Decker*, 34 Mont. 292, 85 P. 1035. This is a departure from the general rule. *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Rodenbrock v. Gress*, 74 Neb. 409, 104 N. W. 758; *Barney v. Lashury*, 76 Neb. 701, 107 N. W. 989; *Stout v. Humphrey*, 69 N. J. L. 436, 55 A. 281; *Leimbach v. Regner*, 70 N. J. L. 608, 57 A. 138; *Goldstein v. Scott*, 78 N. Y. S. 736, 76 App. Div. 78 (N. J. Law applied).

Defendant contracted to give plaintiff the right for sixty days to sell its property at not less than a stated price, plaintiff to have any excess. Plaintiff transferred the option, and the transferees secured a man to look at the property after the expiration of the option, but who refused to buy at the price named, and on their notifying defendant, defendant sold to him at a smaller price. *Held*, that the plaintiff could not recover on a *quantum meruit* for the services rendered, having failed to fulfill the condition which alone entitled him to payment for his services. *Johnson v. Va. & Car. Lumber Co.*, 163 F. 249, 89 C. C. A. 632; *Smith v. Va. & Car. Lumber Co.*, 163 F. 249, 89 C. C. A. 632.

Where the contract between the owner of real estate and a broker employed to sell the same is void because not in writing

as required by the statute, the broker can not recover on a *quantum meruit* for services rendered in accordance with the contract, nor for the value of his time expended in that behalf. *Nelson v. Webster*, 83 Neb. 169, 119 N. W. 256; *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989.

A petition alleged the employment of plaintiff to find a purchaser for land and assist in effecting a sale for an agreed compensation, but that after the purchaser had been procured, and before a sale was effected, the land owner wrongfully repudiated the contract and completed the sale to the purchaser, and that the land owner had died since the sale, and that, by reason of his death, plaintiffs had become incompetent to testify to conversations and transactions with him, and therefore unable to prove the contract, and that by reason of the premises had elected to sue on a *quantum meruit* for the value of their services, instead of the compensation agreed on, states a good cause of action upon a *quantum meruit*, and is not defeated because of the unnecessary explanatory references to the special contract, and plaintiff's incapacity to establish their claim thereunder. *Templeton v. Biegert* (Kan. Sup. '09), 100 P. 654.

Sec. 588. Broker has a right of action against defaulting purchaser for lost commissions.

A real estate broker may sue the purchaser who employed him and who has refused to carry out his contract with the vendor, whereby the broker has lost his right to a commission, and this, although he had agreed to look to the vendor for the commission. *Livermore v. Crane*, 26 Wash. 529, 67 P. 221, 57 L. R. A. 401. Compare Sec. 425.

Sec. 588a. Broker's right to recover from vendee price paid for property purchased for him.

Where a broker purchases property, without disclosing the name of his principal, he becomes liable personally for the price, and he can collect such price from his principal, unless the latter can show payment to the vendor or a release from the broker; and it is immaterial whether the broker disclosed to the vendor that he was acting as an agent only. *Knapp v. Simon*, 96 N. Y. S. 284; *Mechem on Ag.*, Sec. 653.

Sec. 589. No right in equity arises out of a verbal contract for the sale of land.

Where a person assumed, without authority, to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on such representations has no remedy in equity against him for damages on the ground of part performance. *Warr v. Jones*, 24 Weekly Rep. Cas. (Eng.) 695.

Sec. 590. Statute of frauds.

A contract for the purchase or sale of lands for another, not being for the sale of land but for personal services, will not be offensive to the statute of frauds, because not in writing. *Ivy Coal Co. v. Long*, 139 Ala. 535, 36 S. 722; *Stephens v. Bailey*, 149 Ala. 256, 42 S. 740; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Ward v. Lawrence*, 79 Ill. 295; *Fox v. Starr*, 106 Ill. App. 273; *Collins v. Smith*, 18 Ill. 160, 162; *Watson v. Sherman*, 84 Ill. 263, 267; *Fisher v. Bell*, 91 Ind. 243; *Talbot v. Bowen*, A. K. Mar. (Ky.) 436; *Houston v. Boagni*, McGloin (La.), 164; *Hamilton v. Frothingham*, 59 Mich. 253, 26 N. W. 486; *Waterman R. E. Ex. v. Stephens*, 71 Mich. 104, 38 N. W. 685; *Hancock v. Dodge*, 85 Miss. 228, 37 S. 711; *Gwinnup v. Sibert*, 106 Mo. App. 709, 80 S. W. 589; *Riley v. Minor*, 29 Mo. App. 439; *Worrell v. Munn*, 5 N. Y. 229; *Wilson v. Clark*, 35 Tex. Civ. App. 92 79 S. W. 649; *Yearly v. Grigsby*, 9 Leigh (Va.), 387.

In some States, by statute, a contract with a broker to purchase or sell land, must be in writing—California, Indiana, Missouri, Nebraska, New Jersey, New York, South Dakota, Illinois, Washington. *Wysing v. Sills* (Ind. App. '09), 88 N. E. 954; *Farland v. Boyum* (Wash. Sup. '09), 102 P. 34; *McCarthy v. Loupe*, 62 Cal. 299, 10 P. C. L. J. 562; *Pacific Land & Trust Co. v. Blochman*, 11 P. C. L. J. 24; *Perkins v. Cooper* (Cal. Sup. '90), 24 P. 377; *Bissell v. Terry*, 69 Ill. 184; *Rothwell v. Gibson*, 121 Mo. App. 279, 98 S. W. 801; *Kesner v. Miesch*, 204 Ill. 320, 68 N. E. 405; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 A. 646, 810; *Finley v. Hanley*, 121 Mo. App. 358, 98 S. W. 803; *Mendles v. Danish*, 74 N. J. L. 333, 65 A. 888; *Briggs v. Bounds*, 48 Wash. 579, 94 P. 101; *Danielson v. Goebel*, 71 Neb. 300, 98

N. W. 819; *McGury v. Satchwell*, 129 Cal. 389, 62 P. 58; *Dotson v. Toole*, 129 Cal. 488, 62 P. 92; *Watters v. Dancey* (S. D. '09), 122 N. W. 430.

Where plaintiff, at defendant's request, procured the title to real estate, taking it in his own name, and afterward conveyed it to defendant, defendant's agreement to pay him for his services one-half of the sum for which the real estate might be sold, is not within the statute of frauds. *Huff v. Hardwick*, 19 Colo. App. 416, 75 P. 593.

A broker who has made a parol contract of sale of realty can not, after his principal has contracted to sell the land to another purchaser and has so informed the broker, make such a memorandum as will take the case out of the operation of the statute of frauds. *Elliott v. Barrett*, 144 Mass. 256, 10 N. E. 820.

Under Civil Code, Sec. 1624, Sub. 6, requiring that a broker's authorization to sell shall be in writing, a memorandum of authority is not fatally defective because it did not recite the terms of sale and amount of payments. *Baird v. Loescher*, (Cal. App. '08), 98 P. 40.

In an action to recover commissions for selling realty owned by defendant and K., the plaintiff alleged that in offering the property for sale defendant acted as agent for K., and as such agent made an oral agreement to pay plaintiff a reasonable commission for selling the property. Civil Code, Sec. 1624, requires agreements authorizing the sale of realty, or some memorandum thereof, to be in writing and signed by the party to be charged or his agent. *Held*, that, conceding that the broker could contract orally with another as to the compensation he was to receive from the owner for selling realty, the plaintiff did not allege any written contract by defendant with K., and hence he was entitled to no compensation which could be the subject of an oral contract with plaintiff; so that whether the complaint charged defendant individually or as agent for K., the oral agreement with plaintiff for commissions was invalid. *Aldis v. Schleicher*, 9 Cal. App. 372, 99 P. 526.

The provisions of the statute of frauds which require the authority for selling land as a basis for a broker's commission to be in writing, signed by the owner or his authorized agent,

is not complied with, where the person who signed is neither the owner nor his authorized agent. *Ryer v. Winter* (N. J. Sup. '09), 72 A. 84.

A declaration which sets out that defendant employed plaintiff to sell real estate, and a promise by the defendant to pay for such services, need not set out that the authority for selling and the statement of the rate of commissions were in writing, as a statutory requirement to that effect is a matter of evidence only. *Adams v. Grady* (N. J. Sup. '09), 72 A. 55.

Burns' Annotated Statutes, 1908, Sec. 7463, provides that no contract for the payment of a commission to a broker for securing a purchaser for real estate shall be valid, unless in writing signed by the owner. *Held*, that the fact that a broker has fully performed his part of the contract does not take the case out of the statute. *Price v. Walker* (Ind. App. '09), 88 N. E. 78.

A contract whereby a broker was to procure a purchaser for real estate and also for personal property was within the statute. *Price v. Walker* (Ind. App. '09), 88 N. E. 78.

Since the statute renders invalid a contract for the payment of commissions for procuring a purchaser for real estate, unless the contract be in writing, signed by the owner, an oral contract within the statute, though valid in the State where made, can not be enforced in Indiana. *Price v. Walker* (Ind. App. '09), 88 N. E. 78.

Though the statute provides that any agreement authorizing an employe as an agent or broker to sell or purchase real estate for a commission shall be void unless the agreement or promise, or some note or memorandum thereof, be in writing, where the broker sells the land under an oral agreement authorizing the service, the moral obligation of the owner to pay for the services is sufficient to sustain a subsequent written agreement to pay therefor. *Muir v. Kane* (Wash. Sup. '09), 104 P. 153.

A modification of a written contract employing a broker to procure a purchaser of real estate for \$5,000, at a commission of five per cent., by authorizing the broker to sell for \$4,500 is material, and under Burns' Ann. Stat., 1908, Sec. 7463, providing that no contract for the payment of commissions for

procuring a purchaser shall be valid unless the same is in writing, signed by the owner, an action does not lie on the altered contract unless the alteration is evidenced by a writing signed by the owner. *Wellinger v. Crawford* (Ind. App. '09), 89 N. E. 892.

Under a statute providing that any agreement authorizing a broker to sell or purchase real estate for commissions shall be void unless the agreement, or some memorandum thereof is in writing signed by the parties to be charged therewith, a memorandum which authorizes no broker, describes no real estate, contains no agreement for the payment of commissions, and is not signed by the parties, is insufficient. *Swartswood v. Naslin* (Wash. Sup. '10), 106 P. 770.

An agreement by a broker to give a purchaser of land his commissions is not within the statute of frauds. *Spengeman v. Palestine Bdg. Ass'n*, 60 N. J. L. 357, 37 A. 723. An agent who has invested his principal's money in land and taken the title in his own name, will not be allowed to set up the statute of frauds against the enforcement of the trust, on the ground that the agency was without written authority. *Firestone v. Firestone*, 49 Ala. 128; *Lopsed v. Fritz*, 91 N. Y. S. 5, 45 Misc. 620. A memorandum signed by the auctioneer selling real estate, describing the land sold and stating the terms of sale, binds both buyer and seller, and is a compliance with the statute of frauds. *Garth v. Davis*, 27 Ky. L. R. 505, 85 S. W. 692.

Sec. 591. Real estate agent not liable for failure to remove snow from sidewalk.

Real estate agents, whose agency is restricted to the collection of rents of property or the soliciting and submission of offers to purchase, are not within the meaning of an act of Congress requiring the owner, agent or tenant of real estate within the district to remove snow and ice from paving sidewalks in front of their property, and are therefore not liable to the penalties of that statute. *Holtzman v. U. S.*, 14 App. (D. C.) 454.

Sec. 592. Seals, and the necessity for their use.

A real estate agent whose authority is first put in writing in a contract for a sale between the vendor and vendee which

is not under seal, can not recover commissions for the sale. *Alpern v. Klein* (N. J. Sup. '08), 68 A. 799.

It requires an instrument under seal to ratify the unauthorized deed of an agent. *Spofford v. Hobbs*, 29 Me. 148; *Drumright v. Philpot*, 16 Ga. 424; *Reese v. Medlock*, 27 Tex. 120.

Where the act of the principal is required to be done in the name of the principal, the authority to do the act must be conferred by an instrument under seal. *Mitchell v. Sproul*, 5 J. J. Marsh. (Ky.) 264; *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Butterfield v. Beall*, 3 Ind. 203.

In Illinois a power of attorney not under seal will be sufficient to authorize the attorney to sell land, but not to make a conveyance. *Watson v. Sherman*, 84 Ill. 263, 267. See also Sec. 57.

Sec. 593. When tender of written agreement by purchaser not necessary.

The broker is not obliged to cause the party willing to purchase to tender to the seller a written agreement to that effect. *Cook v. Kroemcke*, 4 Daly (N. Y.), 268.

Sec. 594. Employment of broker to measure land does not sustain claim of broker for selling.

Evidence that testator employed claimant, a real estate broker, to procure persons to go on certain premises, measure them and look at them, for the purpose of inducing the tenant to believe that they intended to purchase, does not support a verified claim for commissions on a sale of the house for testator. *Von Hermann v. Wagner*, 30 N. Y. S. 991, 81 Hun, 431.

Sec. 595. Where title taken by broker to land purchased, principal may tender amount and demand deed.

Where a broker acting for his principal has taken the title to land purchased in his own name, the principal, on tendering the amount paid for the land and an amount sufficient to compensate the agent for his services, and a deed for him to execute and demand execution thereof, the agent refusing, may recover the land in ejectment. *Rose v. Hayden*, 35 Kan. 106. *Contra*, *Burden v. Sheridan*, 36 Iowa, 125; *Dorsey v. Clark*, 4 Harr. & J. (Md.) 551.

Sec. 596. When not necessary for broker to show vendor had a clear title.

Where defendant did not base his refusal to carry out an agreement to purchase property upon any invalidity of the owner's title, it was not necessary for the broker, in suing for the commissions for negotiating the purchase, to show that the title was clear. *Hanna v. Espalla*, 148 Ala. 313, 42 S. 443.

Sec. 597. Contract of sale requiring owner to furnish abstract of title not within authority of broker.

Where, in an action by a broker for commissions in procuring a purchaser for a tract of land, it appeared that the contract of employment only fixed the price, and that the broker executed a contract of sale binding the owner to furnish an abstract of title, an instruction that if the owner entered into the contract by which he authorized the broker to sell the land at the price named, and the broker entered into a contract for the sale thereof at the price named, to a person ready, able and willing to pay therefor, he was entitled to his commissions, was erroneous, on the issue whether the sale made by the broker was on the terms on which he was authorized to effect a sale. *Hunt v. Tuttle*, 133 Iowa, 647, 110 N. W. 1026. See references under Sec. 307.

Sec. 598. A custom of usage must be general before a court will declare its existence as a matter of law.

The existence of a custom or usage to the effect that the broker shall be entitled to commissions in the event that his principal declines to complete the transaction negotiated, will not be declared by the court as a matter of law, unless it is notorious and universal. *Durkee v. Vermont Cen. R. Co.*, 29 Vt. 127.

Sec. 599. Where a usage is proved, the law raises a presumption that the agent contracted with reference thereto.

Where the evidence adduced is sufficient to prove that the usage among real estate agents is general, the law raises a presumption that the agent knew the usage and contracted with reference to it. *Cameron v. McNair*, 76 Mo. App. 366. See also Sec. 626.

Sec. 600. Unconstitutionality of statute requiring contract employing broker to be in writing.

Penal Code providing that in cities of the first and second class any person offering for sale real property without written authority shall be guilty of a misdemeanor, is unconstitutional, as improperly abridging the rights and privileges of citizens of one portion of the State with respect to a matter of contracts. *Cody v. Dempsey*, 83 N. Y. S. 899, 86 App. Div. 335; *Grossmann v. Cominez*, 79 N. Y. S. 900, 79 App. Div. 15. Statutes requiring such contracts to be in writing, in other States upheld. *Baker v. Gillan*, 68 Neb., 368, 94 N. W. 615; *City of St. Louis v. McCann*, 157 Mo. 301, 57 S. W. 1016.

Sec. 601. Undisclosed principal.

Plaintiffs, as brokers, entered into a contract for the purchase from defendant of certain bonds, claiming to act for an undisclosed principal and stipulating that they should in no manner be held liable on the contract which, as they had reason to believe, was made by defendant under a misapprehension as to the value of the bonds; in fact, they were acting for themselves, and there was no other principal. *Held*, that they could not maintain an action on the contract; not as agents for an undisclosed principal, because no such principal existed, nor as principals, because by their fraudulent misrepresentations they had secured immunity from liability on the contract as such, and estopped themselves from claiming rights which were correlative with such liability. *Paine v. Loeb*, 96 Fed. 164, 37 C. C. A. 434.

Defendant agreed to furnish to a broker a certain amount of money to be used in the purchase of a mine which was to be conveyed to a corporation to be formed, in which defendant was to have a certain share of the stock, the money advanced to be repaid to him from the profits; the broker purchased the mine, in accordance with the agreement, making a cash payment thereon, which was furnished by defendant, and executed his own notes for the deferred payments, defendant not being known in the transaction with the seller. *Held*, that the broker and not the defendant was the purchaser, and that de-

fendant could not be held liable on the note as an undisclosed principal. *Krohn v. Lambeth*, 114 Cal. 302, 46 P. 164. Compare *Harper v. Nat. Bank*, 54 O. S. 425.

One acting as agent of an undisclosed principal may be treated as the principal by the party with whom he deals. *Welch v. Goodwin*, 123 Mass. 71; *Pentz v. Stanton*, 10 Wend. 271; *Bickford v. First Nat. Bk.*, 42 Ill. 238; *Baldwin v. Leonard*, 39 Vt. 260; *Lawler v. Armstrong* (Wash. '09), 102 P. 775.

Where the real party in interest is not disclosed to the vendor, the broker should not be allowed to prevail, on the theory that he has produced the agent of an undisclosed principal. *Mott v. Minor* (Cal. App. '09), 106 P. 244.

Sec. 602. Where broker must be authorized in writing, contract without unenforceable.

Revised Statutes, 1899, Sec. 3418, providing that no contract for the sale of lands made by an agent shall be binding on the principal unless the agent is authorized in writing to make such contract, *Held*, that where the employment of the broker was not evidenced by the written consent of the land owner, a written contract to sell the same by the broker with a purchaser was unenforceable against the land owner. *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228. See also Sec. 433.

Sec. 602a. Manner in which written contracts with real estate brokers employed to sell real estate should be construed and enforced.

Laws of 1905, p. 110, c. 58, requiring an agreement employing a real estate broker to be written, should be enforced as designed to prevent vendors and purchasers from being defrauded by brokers wrongfully claiming commissions, but not in such manner as to defraud brokers. *McCree v. Ogden*, 50 Wash. 495, 97 P. 503, three judges dissenting.

Sec. 603. Broker can not recover commissions where contract unenforceable.

A real estate agent can not base a claim for commissions on a contract of sale which because of its incompleteness, can not

be enforced. *Bradford v. Menard*, 35 Minn. 197; *Mason v. Small*, 130 Mo. App. 249, 109 S. W. 822. See also Sec. 209.

Sec. 604. Contract by unlicensed broker not absolutely void.

Under the Code requiring a license to practice the business of a broker, and imposing a penalty for the violation thereof, a contract of an unlicensed real estate broker to sell real estate for another is not absolutely void. *Cobb v. Dunlevie*, 63 W. Va., 398, 60 S. E. 384; *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381. See also Sec. 576.

Sec. 605. Agreement to hire auctioneer to sell land need not be in writing.

Plaintiff was employed by defendant to advertise property for sale at auction, and secured an auctioneer and took charge of the sale; after plaintiff had advertised the property and secured an auctioneer, but before the day of sale, defendant sold the property privately, and thereupon agreed with plaintiff to pay him two per cent. of the price for what he had done. *Held*, that the agreement was not within the statute which requires a writing to entitle brokers to commissions for selling real estate, and is valid. *Griffith v. Daly*, 56 N. J. Law, 466, 29 A. 169.

Sec. 606. Memoranda held insufficient to meet the requirements of the statute of frauds.

Ballinger's Acts and Statutes, Sec. 4576, provides that an agreement authorizing or employing a broker to sell or purchase real estate for compensation or commission shall be void unless the contract or some note or memorandum thereof be in writing, signed by the party to be charged; in an action by a broker he relied on a memorandum addressed to himself reading: "Enclosed find contract which S. wishes signed by F. and confirmed by R. Advise us when abstract is ready," and signed by one of the defendants, S. being the other defendant; F. having represented the owner of the land and R. being the owner, and the abstract being an abstract of title to the land. *Held*, that the memorandum was insufficient under the statute. *Keith v. Smith*, 46 Wash. 131, 89 P. 473; *McCrea*

v. *Ogden* (Wash. Sup. '09), 103 P. 788; *Mendenhall v. Rose* (Sup. Ct. Cal. '93), 33 P. 884; *Phillips v. Jones*, 39 Ind. App. 626, 80 N. E. 555.

Sec. 607. Statute of limitations.

Where a broker sold certain property under a contract by which the purchaser leased the same for a term of years with an option to purchase, which option was exercised December 31, 1902, the broker's right to commissions did not accrue until that time, and was not barred by the three years' statute prior to the commencement of the action to recover the same on June 27, 1904. *Coates v. Locust Point Co.*, 102 Md. 291, 62 A. 625.

If a broker having charge of the property of a syndicate makes a contract of sale of lots to a nominal purchaser to show business, and such purchaser assigns to a *bona fide* purchaser who completes the sale, the statute of limitations will run against the broker's claim for commissions as of the date of the *bona fide* sale, and not of the nominal one. *Ross v. Fickling*, 11 App. Cas. (D. C.) 442.

An action against real estate brokers for deceit in selling land is governed by the statute requiring actions for debt not evidenced by a written contract, to be brought within two years. *Gordon v. Rhodes* (Tex. Civ. App. '09), 116 S. W. 40.

A right of action by an agent against his principal for reimbursement for money paid out in defending a suit for breach of warranty of land sold at the principal's request, would not arise until the agent paid the judgment against himself, so that an action brought within six months thereafter would not be barred by limitations, and limitations would not begin to run to bar recovery of the expenses of defending the suit until the last item was paid, as in the case of a running account. *Shearer v. Guardian Trust Co.* (Mo. App. '09), 116 S. W. 456.

A purchaser was induced by fraudulent representations of the broker of the vendor to purchase land for \$12,500, \$5,000 of which was to be in cash, and the balance in notes. The purchaser paid to the vendor \$2,500 of cash, and it was understood that \$2,527 should be paid by the broker to the owner on the purchaser's account. Payment was not made, and the purchaser did not discover the fact until four years and ten

months had elapsed. *Held*, that the right of the purchaser to recover from the broker as for deceit was barred by the four years' statute of limitations. *Gordon v. Rhodes* (Tex. Civ. App. '09), 117 S. W. 1023, certified questions answered, 116 S. W. 40.

Sec. 608. Rival brokers.

One of several independent brokers employed to procure a purchaser must produce a customer of his own, and not one then sustaining that relation to another of the brokers, and when he is first in negotiating with a customer he will continue to sustain that relation until it is expressly broken off or the matter of the purchase has ceased to be held under consideration by the purchaser. *Jennings v. Trummer*, 52 Oregon, 149, 96 P. 874.

Sec. 609. If purchaser willing to perform, statute of frauds not available to defeat broker's commissions.

A real estate broker, in order to recover commissions, must show either a consummation of the sale or the obtaining of a purchaser; the mere fact, however, that the contract was within the statute of frauds does not preclude a recovery for commissions, if a willingness to perform the same is shown. *Carter v. Simpson*, 130 Ill. App. 328; *McKenna v. Harvie*, 38 Minn. 18, 35 N. W. 668. This is true also in the case of a contract to exchange properties. *Schulte v. Meehan*, 133 Ill. App. 491.

Sec. 610. Reasonable price inferred by law.

Where a contract for the sale of land between the owner and a couple of real estate agents provides that the owner shall fix its selling price, the law infers that it shall fix a reasonable price, and that the sale shall be made within a reasonable time. *Tinsley v. Durfey*, 99 Ill. App. 239.

Sec. 611. What is a reasonable time must be determined by the facts and circumstances in each case.

In determining what constitutes a reasonable time within which a real estate broker employed to procure a purchaser for a farm must procure a purchaser in order to be entitled to his

commissions, the facts and circumstances must be considered. *Sallee v. McMurtry*, 133 Mo. App. 253, 88 S. W. 157; *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267. See also Sec. 612.

Where an owner of premises agreed in September to extend the time within which a broker might sell to such time as he could get the prospective purchaser to bind itself to buy, and it was contemplated that the broker was to have until some time after the beginning of the year to make the sale, and the sale was, in fact, closed in April, active negotiations having been kept up all the time with the prospect of eventual success, the delay in closing the sale was not unreasonable, and did not, on that ground, authorize the revocation of the broker's authority without his consent. *Luhn v. Fortran* (Tex. Civ. App. '09), 115 S. W. 667. Writ of error denied by Supreme Court.

Sec. 612. Broker's employment continues for a reasonable time.

Where, at the time a broker was employed to sell real estate, no period was agreed on during which the agency should continue, it continued for a reasonable time after the employment, in view of all the circumstances. *Staehlin v. Kramer*, 118 Mo. App. 329, 94 S. W. 785; *Sallee v. McMurtry*, 113 Mo. App. 253, 88 S. W. 157; *Morgan v. Keller*, 194 Mo. 663, 92 S. W. 75; *Hanna v. Espalla*, 148 Ala. 313, 42 S. 443; *Turner v. Snyder*, 132 Mo. App. 320, 111 S. W. 858; *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267. Compare Secs. 614, 620.

Sec. 613. Contract to pay plaintiff \$1,000,000 if defendant bought railroad bound him only for a reasonable time.

Where plaintiff alleged that defendant agreed to pay him \$1,000,000 for information and services relating to the prospective purchase of a railroad, in case the defendant purchased the same or became interested in its purchase with others, such contract could not be construed to restrain defendant from becoming interested in the purchase of such railroad for all time, on pain of being liable on the contract, but only bound him not to participate in the purchase for a reasonable time unless he paid plaintiff for his services. *Mengis v. Fitzgerald*, 95 N. Y. S. 436, 108 App. Div. 24; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

Sec. 614. Reasonable time immaterial where broker finds purchaser while employed.

Where a broker finds a purchaser at the seller's terms while still employed, the reasonableness of the time which he has taken to do so is immaterial. *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622. See also Sec. 628. Compare Sec. 612.

Sec. 615. In the absence of an express agreement the reasonable value of the services may be recovered by broker.

Where a real estate agent renders services in procuring a purchaser for land, with the owner's consent but without any agreement for the payment of a certain sum for such services, the agent is entitled to recover the reasonable value of the services. *Stephens v. Tomlinson, etc.* (Tex. Civ. App. '05), 88 S. W. 304; *Hawkins v. Chandler*, 8 Houst. (Del.) 434, 32 A. 464; *Biestler v. Evans*, 59 Ill. App. 181; *New Kanawha C. & M. Co. v. Wright*, 163 Ind. 529, 72 N. E. 550; *Carruthers v. Tourné*, 86 Iowa, 318, 53 N. W. 240; *Holles v. Weston*, 156 Mass. 357, 31 N. E. 483; *Boardman v. Hanks*, 185 Mass. 555, 70 N. E. 1012; *Baer v. Koch*, 21 N. Y. S. 974, 2 Misc. 334; *Donald v. Lawson*, 87 N. Y. S. 485; *Lansing v. Johnson*, 18 Neb. 174, 24 N. W. 726; *McMurtry v. Madison*, 18 Neb. 291, 25 N. W. 85; *Harrell v. Zimpleman*, 66 Tex. 292, 17 S. W. 478; *Alexander v. Wakefield* (Tex. Civ. App. '02), 69 S. W. 77.

Sec. 616. Reasonable compensation.

What is a fair and reasonable compensation depends upon the amount allowed for such services by custom or usage locally prevailing among brokers. *Hartman v. Warner*, 75 Conn. 197, 52 A. 719; *Williams v. Clowes*, 75 Conn. 155, 52 A. 820; *Semple v. Rand*, 112 Iowa, 616, 84 N. W. 683; *Thomas v. Brandt* (Md. '93), 26 A. 524; *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336; *Ashby v. Holmes*, 68 Mo. App. 23; *Green v. Wright*, 36 Mo. App. 298; *Lansing v. Johnson*, 18 Neb. 174, 24 N. W. 726; *Potts v. Aechtermacht*, 93 Pa. St. 138; *Insloe v. Jones*, Brightly (Pa.), 76.

Sec. 617. Not necessary for broker to put defendant in default before suing for fees.

Where, after giving plaintiff a power of attorney to act as agent for the sale of defendant's real estate, plaintiff and a

prospective buyer had started to meet the defendant at the property in another State, and defendant put an end to the agency and placed it out of his power to carry out the promise of sale by making a sale to a third person, there was no necessity for plaintiff to put defendant in default before suing for his commissions. *Lockett Land & Em. Co. v. Brown*, 118 La. 943, 43 S. 628.

Sec. 618. Ratification not shown by acquiescence without knowledge.

In an action by a broker to recover commissions for making a sale, defendant's acquiescence in plaintiff's statement that plaintiff had secured a loan for a prospective purchaser did not fairly justify the conclusion that defendant ratified the agency claimed by plaintiff, as no claim of agency was suggested by plaintiff's statement. *Howe v. Miller*, 23 Ky. L. R. 1610, 66 S. W. 184. See also Secs. 458, 567.

Sec. 618a. Reply of owner which did not amount to a ratification.

A contract of sale executed by one having authority only to find a purchaser, and containing provisions not referred to in his letter to the owner that he had an offer of purchase on certain terms and not known to the owner, is not ratified by his reply, "All right, offer accepted." *Hardinger v. Columbia*, 50 Wash. 405, 97 P. 445.

Sec. 619. Ratification by acceptance of offer made to broker.

The acceptance by a vendor of land of an offer actually made to a broker, and the consummation of sale on such terms, is a ratification of the broker's act, and entitles him to his commissions. *Lery v. Wolf*, 2 Cal. App. 491, 84 P. 313. Even when sold through another broker. *Id.*

Sec. 620. Ratification cures defect in agent's appointment.

An owner verbally authorized an agent to offer real estate for sale; the agent, in the name of the principal, gave a broker written authority to procure a purchaser for the land; the owner subsequently ratified the agent's act by offering per-

formance of the contract of sale to the purchaser procured by the broker by tendering a deed conveying the premises. *Held*, that the defect in the appointment was cured by the owner's acts constituting ratification. *Mercantile Trust Co. v. Niggeman*, 119 Mo. App. 56, 96 S. W. 293. See also Secs. 24, 621, 622.

Sec. 620a. Sufficient allegation of ratification.

In an action for commissions claimed to have been earned by the purchase of land for defendant, where the latter claimed that plaintiff acted in violation of his agency by paying a higher price per acre than he was authorized, etc., allegations of the complaint that plaintiff notified defendant from time to time of the purchases, the purchase price, amounts of payments, etc., and defendant, knowing of the purchases and terms thereof, ratified them, as well as the allegations of the reply that the payments of the land in excess of the prices thereof were made with defendant's knowledge and ratified by him, sufficiently alleged ratification. *Mahon v. Rankin* (Or. Sup. '09), 102 P. 608.

Sec. 621. Ratification of agent's appointment by principal executing contract with purchaser.

Where a contract to purchase land is presented to the vendor, signed by the purchaser, it is for the vendor to decide whether the purchase is acceptable, and if he then executes the contract himself, he ratifies the act of his agent in having previously, though unauthorizedly, so done, it is binding on him. *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *Findlay v. Koch*, 126 Iowa, 131, 101 N. W. 766. See also Secs. 24, 620, 622.

Sec. 622. Ratification by acceptance of the proceeds.

A brother and sister were tenants in common of a tract of land, which the principal employed an agent to sell; the agent procured a purchaser and wrote to the brother a letter containing the terms of the contract of sale; the brother showed the letter to his sister, and the brother subsequently wired that the sale was accepted; on the death of the brother the sister wrote to the agent with reference to the sale, and a draft for

a part payment was received by her and cashed; she subsequently orally agreed to a conveyance of the land according to the contract. *Held*, that she ratified the contract of sale. *Stuart v. Mattern*, 141 Mich. 686, 105 N. W. 35, 12 D. L. N. 616. See also Secs. 24, 620, 621.

Sec. 623. To constitute ratification of the act of attorney, knowledge on part of principal immaterial.

Where one authorizes an attorney in fact, by power duly signed and acknowledged, to make a certain contract for the purchase of land with certain parties, and of a certain date, and subsequently ratifies the act of his attorney, it is immaterial whether he knew all the terms and conditions of the contract at the time it was made, and he will be bound by the contract made by such attorney. *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666.

Sec. 624. It is an essential prerequisite to ratification that the principal had knowledge of unauthorized contract.

A signature to an agreement for the sale of land made for another without authority, may be by him adopted and ratified so as to be of the same force as if made by authority antecedently given, and such ratification may be inferred from circumstances, but knowledge that there was such an agreement signed for him is an essential prerequisite to proof of his ratification. *O'Reilly v. Keim*, 54 N. J. Eq. 418, 34 A. 1073. See also Sec. 24.

Sec. 625. Tender not necessary to entitle broker to recover on principal's refusing purchaser.

Where a broker obtained a purchaser who in good faith offered to buy at defendant's price, a formal tender of the price was not necessary until defendant evinced some disposition to accept it, in order to entitle the broker to commissions. *Carlin v. Lifur*, 2 Cal. App. 590, 84 P. 292. Nor to bring the purchaser into the owner's presence. *Getzelsohn v. Donnelly*, 98 N. Y. S. 213, 50 Misc. 164. The refusal by the owner to accept the offer was a waiver of tender. *McDermott v. Mahoney*, 115 N. W. 32, 139 Iowa, 292, 106 N. W. 925; *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622.

CHAPTER IV.

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Sec. 626. Custom or Usage.

A custom that did not require purchasers of land to pay cash, although the terms of sale were for cash payments, will not sustain a contract of sale made by a real estate agent which violated an instruction to sell for one-third cash. *Wandless v. McCandless*, 38 Iowa, 20. Where a principal claimed that its broker had been notified of its custom to give only quitclaim deeds to purchasers of its real estate, evidence to show that after its refusal to give a deed with warranty, it offered to give such a deed if an increased price was paid was admissible to show that no such custom existed. *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 A. 867. Where a custom exists among real estate agents and their customers which entitles the agents to commissions on a sale of land placed in their hands, whether the sale is made by them or by others, during the period it is under their control, such custom amounts to a contract when it is known to their customers. *Harrell v. Zimpleman*, 66 Tex. 292, 17 S. W. 478. See also Secs. 599, 626a.

A custom must be certain, uniform and generally understood, or it is not binding on the principal. *Insloe v. Jones*, Brightly (Pa.), 76; *Pratt v. Bank*, 12 Phila. (Pa.) 378; *Colland v. Traped*, 70 Ill. App. 228; *Potts v. Aechtermacht*, 93 Pa. St. 138. An offer to prove a general custom among brokers acting for both parties to an exchange of lands to charge commissions

to each, held properly refused, for the reason that it appeared that the broker was the agent of one of the parties, and could not therefore legally demand compensation from the other. *Dartt v. Somnesym*, 86 Minn. 55, 90 N. W. 115.

A real estate agent seeking to recover commissions for negotiating a sale where no contract was made in regard thereto, may prove a custom as to the rate of commissions and the time of payment in the place where the business was done and the land sold. *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

A custom existing among real estate brokers, according to which a commission is divided, where one broker has a buyer and the other a seller, is not sufficient to entitle the broker representing the seller, but not effecting the sale, to recover of a broker who was the procuring cause of the sale one-half of the commissions earned. *Hedenberg v. Seeberger*, 140 Ill. App. 618.

Sec. 626a. Custom insufficient to supply lack of employment as broker.

The existence of a custom to the effect that when brokers negotiate a lease of real property the lessor pays the commission, can not fasten on a property owner any liability as the employer of the broker, simply because he leases the property to one introduced by the broker to take it, without any request, express or implied, on the part of the owner. *Brady v. American M. & E. Co.*, 83 N. Y. S. 663, 86 App. Div. 267. See also Sec. 626.

Sec. 627. Defendant can not object where evidence shows sale for less than broker claims.

In an action for commissions for selling land, where the petition alleges that the tract contained thirty-five acres and that the purchaser agreed to purchase it "for the sum of \$200 per acre, and in the aggregate for the sum of \$7,000," and that defendant agreed to pay plaintiff five per cent. for procuring a purchaser, and the evidence shows that the land disposed of contained forty-two acres, and was sold for \$7,000, but after the sale the tract was found to contain only thirty-five acres, whereupon defendant made the sale for \$6,500, judgment for five per cent. on the \$6,500 is warranted, and

defendant can not object that the pleading alleged a sale for \$200 an acre, while the evidence showed a sale for less than that sum. *Hoefling v. Hambleton*, 84 Tex. 517, 19 S. W. 689.

Sec. 628. Presumptions.

Any one dealing with a person whom he knows to be a broker may be presumed to know, from the nature of the broker's business, that he is acting as agent for some third person. *Baxter v. Doren*, 29 Mo. 434. The fact that a real estate agent had been licensed for a number of years and had a license at the time of a certain trial to recover commissions in another case does not raise a presumption that he had a license at the time of the transaction for which commissions are sought to be recovered. *Eckert v. Collot*, 46 Ill. App. 361.

The solvency and ability of the proposed purchaser to perform the obligations of his contract will be presumed until the contrary is proved. *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15. (This is contrary to the general doctrine.) Where a vendor accepts the purchaser proposed by the broker and enters into a contract with him, the solvency of the purchaser will be presumed, in the absence of proof. *Parker v. Estabrook*, 68 N. H. 349, 44 A. 484; *Springer v. Orr*, 82 Ill. App. 558; *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229; *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15. Compare *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

Where a contract to procure a purchaser of real estate has been continued, or the time within which a sale was to have been made is waived, without reference to the compensation of the broker, the presumption is that he is entitled to recover the sum originally agreed upon. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899. An agency to sell real estate is presumed to continue until a sale is effected, and the burden is on the owner to rebut such presumption. *Hartford v. McGillicuddy*, 103 Me. 224, 68 A. 860. See also Secs. 612, 614.

In an action for procuring a loan on property, it can not be assumed, in the absence of evidence, that it was not made because of defendants' fault or because they did not have a good title. *Rosenthal v. Gunn*, 119 N. Y. S. 165.

Sec. 629. Assumpsit.

An innocent vendor can not be sued in tort for the fraud of his agent in effecting a sale; in such a case the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in *assumpsit* for it, or he may sue the agent for the deceit. *Kennedy v. McKay*, 43 N. J. L. 288; *Volker v. Fisk* (N. J. Ch. '09), 72 A. 1011; *Sterling v. Bank of Sparta*, 136 Wis. 369, 117 N. W. 798.

Sec. 630. Actions between principals and agents.

An action by a broker for his commissions will not lie until it is shown that he has effected or contracted a sale of the property; unsuccessful efforts, however meritorious, afford no ground of action, he loses his labor and effort which he staked upon success; his commissions are based upon the contract of sale. *Viaux v. Old South Society*, 133 Mass. 1, 10; *Drury v. Newman*, 99 Mass. 256. See also Sec. 563

The recovery in an action by a principal against a broker for fraudulently representing that the worthless property on which the loan was made was good security, is not affected by the question whether he shared the money with or delivered any part of it to the pretended borrower. *Rubens v. Merd*, 121 Cal. 17, 53 P. 432.

One who employed a broker to sell his land can not maintain an action against the broker to recover the balance of the purchase money in the hands of the latter until a demand, and an accounting on demand, has been made and refused. *Gobin v. Phillips*, 12 Ind. App. 629, 40 N. E. 929; *Shepard v. Brown*, 9 Jur. N. S. (Eng.) 195, 78 T. Rep. N. S. 499, 11 W. Rep. 162.

Where, in an action against brokers who had effected a sale of plaintiff's land, the parties alleged that defendants received from the purchaser a sum of money for the use of plaintiff and retained it, refusing to pay it over, the petition was not insufficient for failing to allege that defendants were authorized to collect the money. *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53.

Where the property of the principal is sold by the broker on terms not authorized, in an action against the latter for damages caused by such sale, in the absence of an allegation of fraud on the part of the agent, the principal must plead a

return of the consideration to the purchaser or an offer to do so. *Lunn v. Guthrie*, 115 Iowa, 501, 88 N. W. 1060.

Plaintiff agreed in writing to convey lands to the order of the defendant for a price named, and to pay him a brokerage commission for effecting a sale of it; the defendant sold the land for a sum larger than the price named by the plaintiff, and retained the difference himself, and charged the plaintiff his commissions. *Held*, in an action to recover the difference, that the plaintiff should have been permitted to show that his property had been and was in the hands of the defendant for sale as a broker on commission before and at the time of signing the agreement, as well as what representations were made by the defendant as to his object in taking the agreement, and its purposes so far as he was concerned, as, if they were of the nature which the plaintiff offered to show, they had a tendency to show that the agreement was procured by fraud and misrepresentation on the part of the defendant. *Bassett v. Rogers*, 165 Mass. 377, 43 N. E. 180.

Where separate owners of part of an entire piece of real estate jointly employed a broker to sell the entire tract, an action may be maintained against them jointly on the contract. *McGill v. Pressly*, 62 Ind. 193. See also Sec. 407. Where an intending purchaser of land, who had paid a sum as for first money to the broker employed to sell it, refused to complete his contract of purchase and waived the time within which he could complete it, and the broker converted the sum paid, the right of the owner of the land to sue the broker for such sum accrued, though the time for the purchaser's completion of the contract had not expired. *M. L. Chambers & Co. v. Herring* (Tex. Civ. App. '05), 88 S. W. 371.

A broker under a contract to procure a purchaser of real estate, which stipulated that the owner was to receive a specified sum out of the price, and that the balance was to be paid to the broker as his commissions, does not make out a case for the recovery of his commissions by showing that he secured a contract with solvent parties to purchase the land, but must show, either that the owner received some part of the balance of the price to which the broker was entitled, or that the parties who agreed to purchase were ready, able and willing to

purchase, and were prevented from doing so by the default of the owner. *Lewis v. Briggs*, 81 Ark. 96, 98 S. W. 683. See also Sec. 535.

M. & W., each claiming to have been the procuring cause of the sale of defendant's farm, brought separate actions for commissions against defendant in different counties; W. was made a party defendant to M.'s action, and filed an answer, making it a cross-petition against defendant, to which defendant answered and M. filed a reply. *Held*, that W.'s action should be dismissed, and both M. and W. should be required to interplead in the action in which both were parties. *Hopkins v. Moseley*, 31 Ky. L. R. 1308, 105 S. W. 104.

Where a real estate agent employed by the vendor in a sale of land holds the receipt given the purchaser by his principal for money paid thereon, and afterward the sale is abandoned by the vendor and the money returned to the agent who delivers up the receipt, he is so far acting as the agent of the purchaser in the receipt of the money that the latter may maintain an action against him to recover it. *Phelps v. Brown*, 95 Cal. 572, 30 P. 774. See Sec. 25.

As a result of the confidential relations existing between the parties, and the good faith required, if an agent, being authorized to sell land for his principal at a fixed price, sells it for a higher price, he must account to his principal for the excess. *McDonald v. Fithian*, 1 Gilm. (Ill.) 269; *Ziegler v. Hughes*, 55 Ill. 288; *Meeker v. York*, 13 La. Ann. 18; *Bruce v. Davenport*, 36 Barb. (N. Y.) 349; *Merryman v. David*, 31 Ill. 404; *Kerfoot v. Hyman*, 52 Ill. 512.

Plaintiff alleged that he employed H. to find a purchaser for a farm, and that he found a purchaser for a price which included the assignment of a note and mortgage executed by S.; that on the day the sale was to be completed the purchaser handed H. a roll of money and some papers, which he falsely represented to be the note and mortgage of S. H. falsely and fraudulently represented that it was necessary for him to retain the papers to have the assignments recorded, which plaintiff permitted him to do; that the papers so turned over were not in fact the note and mortgage of S., but two notes executed by G., which were outlawed and worthless; that

as soon as plaintiff learned such fact he refused to accept the G. notes and demanded a return of his deed, offering to return the consideration, which was refused; and that the purchaser and H., both of whom were made defendants, had conspired to cheat and defraud plaintiff and had agreed that the G. note should be substituted for the S. note, and that H. should represent that the papers so turned over were the papers agreed to be received, etc., and prayed judgment for damages sustained by reason of defendants' fraudulent acts in the sum of \$2,000. *Held*, that the complaint stated a cause of action *ex delicto* and not on contract. *Francesi v. Hatch*, 117 Wis. 242, 93 N. W. 1118.

A real estate broker who takes an option for the purchase of property in his own name, but in reality for the benefit of a customer to whom he demands its conveyance, having himself no interest in the contract beyond a contingent commission in case the sale is made, can not maintain a suit for specific enforcement of the contract, under Rev. Stat. of Idaho, Sec. 4090, which provides that every action must be prosecuted in the name of the real party in interest, with certain exceptions, none of which covers such case. *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491.

A complaint which alleges that defendant employed plaintiff to procure within a specified time, "an acceptance of a certain application made by defendant for a loan," and that, within the time, plaintiff procured a third person "to accept said application," sufficiently alleges that defendant was notified of the acceptance, though it does not allege that the determination of the third person was communicated to the defendant, which must be proved to justify a recovery. *Morton v. Petit*, 117 N. Y. S. 364.

Sec. 631. Common counts.

Under Burns' Rev. Stat. 1901, Sec. 6629a, providing that no contract for the payment of any sum of money for commissions for procuring by one person of a purchaser of real estate of another shall be valid unless in writing, signed by the owner of the real estate, no recovery can be had on the common counts for selling real estate under oral employment therefor. *Beahler v. Clark*, 32 Ind. App. 222, 68 N. E. 613.

Where there was a special contract of employment of brokers to sell certain real property, they would not be entitled to recover for their services on the common counts, unless the agreement was executed and completed on their part, or they were prevented from completing the sale within the time limited in the contract for its completion. *McGonigal v. Roughley* (Del. Super. '06), 63 A. 801.

A real estate broker's commissions fully earned under an express contract may be recovered under the common counts, and the contract itself admitted in proof of the particulars of the general right so set up. *Risley v. Beaumont*, 71 N. J. L. 372, 59 A. 145; *Lawrence v. Rhodes*, 188 Ill., 96, 58 N. E. 910; *Tanner v. Clapp*, 139 Ill. App. 353.

Proof in the first instance that the plaintiffs were licensed real estate brokers is unnecessary to a recovery under the common counts for their commissions. *Munson v. Fenno*, 87 Ill. App. 655.

Sec. 632. Petition—Ultimate facts to be proved must be pleaded.

Plaintiff must plead the ultimate facts upon which he relies for a recovery, else he can not prove them. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775. To entitle him to recover commissions on a particular contract of employment he must plead it. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

Sec. 632a. Petitions in actions to recover commissions.

An action by a real estate broker for commissions will not lie until he has effected or procured a sale. *Mueller v. Bell* (Tex. Civ. App. '09), 117 S. W. 993. (Compare, when employed to procure a purchaser.) *Bradley v. Bower* (Neb. Sup. '04), 99 N. W. 490. And a complaint by a real estate broker for commissions which alleges that defendant employed him to sell the land and agreed to pay him a certain commission if he found a purchaser, and that he advertised and sold the land to one who paid the purchase money, and received a deed, but that the defendant refused to pay the broker his commissions is good against demurrer. *Adams v. McLaughlin*, 159 Ind. 23, 64 N. E. 462; *Lukin v. Halderson*, 24 Ind. App. 645, 57 N. E. 254; *Cannon v. Castelman*, 24 Ind. App. 188, 55 N. E. 111; *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790; *Wright v. Beach*, 82 Mich. 469, 46 N. W. 673; *Lemon v. DeWolf*, 89 Minn. 465, 95 N. W. 316; *Downey v. Turner*, 28 N. Y. App. Div. 491, 51 N. Y.

S. 105; *Yarborough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645; *Brockenbrow v. Stafford* (Tex. Civ. App. '03), 76 S. W. 576.

A complaint for a commission is sufficient if it states such facts as will inform the defendant of the nature of the action, and be so explicit that a judgment thereon will bar another suit for the same cause. *Beineke v. Wuegler*, 77 Ind. 468; *Ackerman v. Bryan*, 33 Neb. 515, 50 N. W. 435.

A complaint for a commission by a broker employed to sell lands must allege in direct and positive terms that he rendered the services which resulted in the sale of the property, or that he produced to the principal a party ready, willing and able to purchase said property upon the terms named. *Jacobs v. Shenon*, 3 Ida. 274, 29 P. 44; *Booth v. Moody*, 30 Ore. 222, 46 P. 884; *Sullivan v. Milliken*, 113 Fed. 93, 51 C. C. A. 79.

If the complaint alleges that the defendant refused to consummate the sale, it must also allege that the customer was able, ready and willing to buy the property on the terms proposed by the principal, or it is fatally defective on demurrer. *Sayre v. Wilson*, 86 Ala. 151, 5 S. 157; *Reardon v. Washburn*, 59 Ill. App. 161; *Newton v. Donnelly*, 9 Ind. App. 359, 36 N. E. 769.

Sec. 632b. When right of action for commissions accrues to a broker.

A petition by a broker for commissions for effecting a sale or exchange of property must allege a contract of employment, and a demurrer was sustained by reason of its failing to do so. *Toole v. Baer*, 91 Ga. 113, 16 S. E. 378; *Fenwick v. Watkins*, 25 Ky. L. R. 1962, 79 S. W. 214. The petition may properly set forth the agreement between the owner and the purchaser settling the matter arising out of the owner's failure to sell, as showing an insistence by the proposed purchaser on his right to purchase. *Wilson v. Clark*, 79 S. W. 649, 35 Tex. Civ. App. 92. Where a petition by a broker employed to secure a loan does not allege that the transaction was consummated, it must allege that plaintiff notified the defendant that a lender was found. *McLaughlin v. Whiton*, 76 N. Y. S. 1006, 37 Misc. 838; *Penter v. Staight*, 1 Wash. 365, 25 P. 469. Where plaintiff was to receive \$1,500 for furnishing a \$25,000 cash purchaser, and furnished one who purchased at \$20,000 cash, he can not recover proportionate commissions on the lesser sum, or what his services are reasonably worth, when he does not declare on a *quantum meruit*. *Steinfeld v. Storm*, 63 N. Y. S. 966, 31 Misc. 167.

Sec. 633. Petition alleging failure to exchange defective in alleging contract for purchaser, no breach.

Where a petition alleged a failure of the defendant to make an exchange of property procured by the plaintiff, it was held defective in alleging a contract to procure a purchaser, with an implied contract to pay the reasonable value of the services; consequently there was no breach of contract for which the defendant was liable in damages to the plaintiff, and a demurrer was properly sustained. *Mulhall v. Bradley*, 63 N. Y. S. 782, 50 App. Div. 179.

Sec. 634. Petition alleging sales to persons defective for failure to give names, etc.

A petition by an agent to sell land to recover damages for refusal of the owner to execute deeds to purchasers, which alleges a contract by him to various persons who were ready and able to buy the lands on the terms agreed on between him and the defendant, is defective for failure to allege the names of such purchasers, the quantity of land agreed to be sold to each of them and the price. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775.

Sec. 635. Petition alleging deed of trust defendant refused to release defeating sale, not defective.

A petition which alleged that the sale failed because of an unsatisfied deed of trust on the property, which the defendant failed to release or have cancelled, is not defective in failing to allege that the deed was a lien on the property, or that defendant refused to consummate the sale. *Gerhard v. Peck*, 42 Mo. App. 644.

Sec. 635a. Complaint not objectionable for failing to show that plaintiff found a purchaser on terms offered by mortgagee.

A complaint alleged that a mortgage foreclosure on land was compromised by the mortgagor conveying his title to the mortgagee, and in consideration the mortgagee delivered a contract giving the mortgagor the exclusive sale of the mortgaged property, and that should he succeed in selling at more than the amount due the mortgagee, the excess should be retained as commissions; that the mortgagor assigned to plaintiffs his interest in the contract; that plaintiffs sold the property and tendered to the mortgagee the amount due it, and that plaintiffs were at all times willing to perform, and had performed all the conditions of the contract, is not subject to the objection that it fails to allege that plaintiffs found a purchaser on the terms offered by the mortgagee, and clearly shows that a sale was made so as to secure to the mortgagee all it

could claim under the contract. *Chatfield v. Continental B. & L. Ass'n*, 6 Cal. App. 665, 92 P. 1040.

Sec. 636. Petition that broker was to have all over a certain sum, not breached by owner selling at net price.

Where a petition alleged that plaintiffs were employed to sell defendant's land, that they were to have all they could obtain for it over a certain sum, and that they offered it to one who purchased it of defendant for that sum, they could not recover the reasonable value of their services on an implied contract on the ground that the defendant had accepted the benefit of their services; and plaintiffs could not recover of defendant for breach of an agreement that he would ask the sum fixed by the brokers of any customer who came to him, where the complaint did not allege such a contract. *Ames v. Lamont*, 107 Wis. 531, 83 N. W. 780.

Sec. 637. Petition declaring on express contract, on failure to prove may recover on promise to pay certain per cent.

Although the plaintiff declared on an express contract to pay him all that he could sell a tract of land for over a certain sum, he may recover on the further allegation of an express promise of defendant to pay him a certain percentage commission, where the broker said he was in the habit of receiving five per cent. commission on sales, to which the defendant did not dissent. *Armstrong v. Cleveland*, 32 Tex. Civ. App. 482, 74 S. W. 789; *Bab v. Hirschbein*, 12 N. Y. S. 730.

Sec. 637a. Necessary allegations and proof to enable broker to recover commissions for effecting a sale or exchange.

Under a written agreement of a land owner to pay a broker a certain sum if he would send or cause to be sent to the land owner a person with whom the latter "may see fit and proper to effect a sale or exchange" of the land, the broker can not recover the sum stipulated, without proof of a sale or exchange of the land; nor on a *quantum meruit* for services in negotiating for such a sale or exchange, without proof that such negotiations were rendered fruitless by the fault of the land owner. *Walker v. Terrill*, 101 Mass. 257.

Sec. 637b. Petition sufficiently setting out contract with firm of real estate brokers to sell land.

The petition of C. K. & B. alleging that plaintiffs are a real estate firm, that defendant placed land in the hands of C. & K. to sell, and agreed to pay them a commission for selling it, that they sold it, and that after the contract between defendant and C. & K. was made, C. & K. formed a partnership with B. and he thereby became interested in said contract, sufficiently charges, as against the claim of variance,

that defendant contracted with C. & K. as partners. *Cook v. Platt*, 126 Mo. App. 553, 104 S. W. 1131. But see Sec. 37. Mechem on Ag., Sec. 221.

Sec. 638. Petition, plaintiff can not recover on proof of contract substituted for that sued on.

Plaintiff can not recover on proof of a contract other than that declared on. *Daley v. Russ*, 86 Cal. 114, 24 P. 867; *Kidman v. Garrison*, 122 Iowa, 215, 97 N. W. 1078; *Jones v. Pendleton*, 134 Mich. 460, 96 N. W. 574; *Brady v. Barnett*, 34 Tex. Civ. App. 433, 78 S. W. 965.

Sec. 639. Petition, failing to prove agreed compensation, recovery of reasonable value may be had.

It has been held on a petition to recover an alleged agreed compensation for services as broker, a recovery may be had on proof of the reasonable value of the services, and the variance may be disregarded unless it appears that defendant was misled. *Susdorf v. Schmidt*, 55 N. Y. 319. Compare Sec. 587.

Sec. 640. Petition alleging plaintiff acted as broker, secured purchaser, defendant refused deed, good against demurrer.

A complaint alleged that plaintiff acted as broker for defendant and secured a purchaser for his land, but that defendant refused to make a deed therefor, and that plaintiff was entitled to his commissions. *Held*, to show a cause of action and to be good on demurrer for the want of facts. *Beincke v. Wuegler*, 77 Ind. 468; *Long v. Thompson*, 73 Kan. 76, 84 P. 552; *Yoder v. Randol*, 16 Okl. 308, 83 P. 537, 3 L. R. A. 576; *Rempel v. Hopkins*, 101 Minn. 3, 111 N. W. 385; *Ackerman v. Bryan*, 33 Neb. 515, 55 N. W. 435; *Ross v. Carr* (N. M. Sup. '09), 103 P. 307.

Sec. 640a. Petition for commissions not demurrable for failing to allege customer was ready, able and willing to purchase.

In an action by brokers on a contract whereby they agreed to procure for defendant a customer for her property at a specified price, a complaint alleging a compliance with the contract by plaintiffs was not demurrable for failing to allege that the customer was ready, able and willing to pay for the property. *Lunsford v. Bailey*, 142 Ala. 319, 38 S. 362.

Sec. 641. Petition, on contract to pay if sale made by owner, agent may recover without showing performance.

Defendant made complainant his agent to sell certain lands, the agency to continue for six months, unless sooner terminated by a sale; defendant reserved the right to sell the land him-

self, in which case plaintiff was to receive the same fee as if he had sold it; within seventeen days after making the contract defendant sold the land and plaintiff sued for his fees. *Held*, that the plaintiff need not expressly allege that he had performed the contract on his part. *Singleton v. O'Blevins*, 125 Ind. 151. Compare *Wolff v. Dembosky*, 74 N. Y. S. 465, 36 Misc. 643, 66 A. D. 428.

Sec. 642. Petition to recover money broker refuses to pay need not allege he had authority to collect.

Where, in an action against a broker who had effected a sale of plaintiff's land, the petition alleged that defendant received from the purchaser a sum of money for the use of plaintiff and retained it, refusing to pay it over, the petition was not insufficient for failing to allege that defendants were authorized to collect the money. *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53.

Sec. 642a. Broker held not liable to pay to principal money refunded to purchaser on rejected contract of sale.

Plaintiffs authorized defendant to sell land for them, no terms being stated in the agreement, at a certain price within five days, agreeing to pay as commission whatever the land brought over the price fixed. Defendant found a purchaser who paid down a bonus on condition that if the title was not insured by a certain title insurance company, the bonus was to be refunded. The title was not insured and defendant refunded the money paid. Plaintiffs then sued defendant, claiming that it had received this money as plaintiffs' agent. *Held*, that defendant was more than a mere agent of plaintiffs, the agreement being in the nature of an option for five days, and defendant was not liable for such money. *Robinson v. Easton*, 28 P. 796, 93 Cal. 80.

Sec. 642b. Broker receiving money for his principal not liable to repay on suit by party entitled thereto.

An agent receiving money for his principal in pursuance of a valid authority without fraud, duress or mistake, is not liable to an action in behalf of the person who is ultimately

entitled to the money, for neglecting to pay the same upon request, and before it was paid over to the principal. *Colvin v. Holbrook*, 2 N. Y. 126; *Costigan v. Newland*, 12 Barb. (N. Y.) 456. See also Sec. 384.

Sec. 642c. Circumstances under which party entitled to money may sue the agent for its recovery.

Where money was paid to an agent on a purchase of land, under circumstances showing bad faith, as where it was the design of the vendor to put upon the purchaser a defective title, the latter is entitled to a return of his money, and he will not be required to pursue the principal, but may sue the agent for a recovery of the money, although he knew at the time of paying the money to the agent that the latter was acting in that capacity; because, if the vendor or his agent knew at the time of the contract that the vendor had no title to the land, it was a palpable fraud and the purchaser was entitled to rescind the contract; payment of the money over to the principal, without notice of the fraud on the part of the agent, or notice not to pay it over, would be a good defense, but the agent should prove such payment over, as the law will not presume it. *Shepherd v. Underwood*, 55 Ill. 475.

Sec. 643. Petition alleging sale by owner ending contract demurrable for failure to allege sale by agent.

Defendant listed certain property with plaintiff for sale under a contract providing that when the land was sold, or when plaintiff performed its part of the contract defendant was to pay five per cent. commissions and all that the land was sold for over the sum specified; that plaintiff was to advertise the land for sale, and that by selling the land himself or by giving plaintiff thirty days' notice, defendant might terminate the agreement, which, in either event, should be considered as performance on plaintiff's part; the first land company that sold was to get the commissions, and the rest to claim no commission; plaintiff alleged that defendant terminated the agreement by a notice that he had sold the land. *Held*, that under such contract it was entitled to a commission only in case it actually made a sale of the land, and that the petition was

therefore demurrable. *Iowa Land Co. v. Schoenewe* (Iowa Sup. '05), 102 N. W. 817. See also Sec. 15.

Sec. 644. Petition alleging notice of double employment and defendant consented, not demurrable.

Where, in an action on a broker's contract for the sale of real estate, he alleged that after undertaking the sale for defendant he reported to him that he had a purchaser who had offered him \$5,000 in cash to bring about the purchase, and that defendant assented to plaintiff's acceptance of the joint employment and stated that it would in no wise interfere with their contract, the petition was not demurrable as showing a forfeiture of plaintiff's right by his acceptance of an inconsistent employment. *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448.

Sec. 645. Petition which alleged bringing parties into touch, etc., insufficient.

. A petition praying for judgment for \$2,000, alleged that defendant, being the owner of land, employed plaintiff, agreeing to pay him all over \$4,000 that could be realized in a sale of the land; that plaintiff rendered services in looking up and bringing in touch with defendant on the proposition of a sale of the land, which thereafter was consummated for \$6,000 cash. *Held*, insufficient in not alleging what plaintiff was employed by defendant to do, or that he either effected a sale, or that it resulted from any services under his employment. *Fenwick v. Watkins*, 25 Ky. L. R. 1962, 79 S. W. 214.

Sec. 646. Petition alleging services which defendant accepted, good by promise to pay.

In an action by a real estate agent to recover commissions for selling property, an allegation in the petition that the services were performed "for the defendant with his consent," and that he accepted the services and consummated the trade, is not sufficient to raise an implied promise to pay for the services, and the petition would not be good but for the allegation of an express promise to pay. *Viley v. Pettit*, 96 Ky. 576, 16 Ky. L. R. 286, 650, 29 S. W. 438.

Sec. 647. Petition failing to show written contract, alleged benefits to defendant immaterial.

Where a petition, in an action by a real estate agent to recover commissions, fails to show a written contract as required by statute, the fact that the plaintiff alleges that defendant received the benefit of his services and therefore can not be relieved of his liability to pay for the same, is immaterial. *Covey v. Henry*, 71 Neb. 118, 98 N. W. 434; *Smith v. Aultz*, 78 Neb. 453, 110 N. W. 1015.

Sec. 648. Petition setting forth incomplete copies of unsigned letters as contract demurrable.

Where a petition sets forth letters alleged to have been written to the parties, and to have created the necessary written contract between the owner of the land and the broker, but does not purport to give full copies, and neither is there any allegation that the letters were signed, the petition is subject to demurrer. *David Bradley v. Bower* (Neb. Supreme '04), 99 N. W. 490.

Sec. 649. Petition for commissions on passing of title defective in not showing acts or omissions of defendant.

A complaint for broker's commissions under a contract whereby defendant agreed that in consideration of plaintiff's procuring a contract to be made with E. for the purchase of certain land of defendant, plaintiff should receive a commission in the event of the closing of title, and only in the event that title should pass, except for default of defendant, is insufficient in alleging only that plaintiff procured a contract for the purchase of land to be executed by defendant and E., and that because of the default of defendant the premises were not conveyed; it should show that E. was ready to take title to the premises, and at the time provided in the contract, and the particular acts or omissions of defendant which prevented the passing of the title. *Davis v. Silverman*, 90 N. Y. S. 589, 98 App. Div. 305.

Sec. 649a. Petition which failed to state cause of action.

A contract between the owner of real estate and a broker provided that on a sale under a certain option, which had been given, a commission should be paid to the broker, of which one-

third should be taken from the cash portion of the price, contemplates an actual sale, and a petition showing an agreement to buy and sell, subject to a deposit of "earnest" by the proposed buyer, but which fails to allege that a sale has been made, or that the customer is willing to comply with his agreement to buy declares no cause of action. *Jardy v. Salmon Brick & Lumber Co.*, 121 La. 457, 46 S. 572.

Sec. 650. Petition for procuring tenant who purchased, bad for not alleging employment to make sale.

A complaint, in an action by a broker for commissions for procuring a purchaser for real estate, alleged that he procured a tenant for defendant for certain premises; that a lease for a specific number of years was executed, which reserved to the tenant the privilege of purchasing the premises for a specified sum at any time within a specified period; that before the expiration of the period he induced the tenant to consummate the purchase, and that he demanded as his commissions a specified sum, which defendant refused to pay, was bad for failure to allege the employment of the broker to effect a sale. *Morris v. Poundt*, 99 N. Y. S. 844, 51 Misc. 6; *Wefel v. Stillman*, 151 Ala. 249, 44 S. 203.

Sec. 651. Petition alleging agreement to pay all over a certain sum as commissions on sale is sufficient.

In an action by a real estate broker, the plaintiff alleged that defendant employed him to obtain for defendant a purchaser for a certain piece of property, agreeing with plaintiff that he should be paid for his services all of the purchase price above a certain sum. *Held*, sufficient in the averment of the employment of plaintiff. *Stephens v. Bailey*, 149 Ala. 256, 42 S. 740.

Sec. 652. Petition for commissions for selling bonds defective, should aver evil repute rendered sales impossible.

Plaintiff sued to recover commissions for selling bonds in Germany; the plaintiff alleged that the sale was not completed because the prospectus furnished by defendant contained false statements; that one defendant sent to Germany with plaintiff by the defendants had such an evil reputation that it prevented the sale; and that defendants recalled plaintiff before he had reasonable opportunity to complete the sales. *Held*, to

state no cause of action for failing to show that performance was impossible because of the bad repute of one of the defendants, that being a risk which was assumed by plaintiff. *Lenkel v. Mitchell*, 106 N. Y. S. 549, 55 Misc. 395.

Sec. 653. Petition for commissions out of last cash payment must aver such payment.

Where a broker's contract for commissions provided that the amount sued for was payable out of the last cash payment, such payment constituted a condition precedent to any liability on defendant's part to pay such amount to plaintiff; and hence an allegation in plaintiff's complaint that the sum sued for "became due" on a given date was not a sufficient allegation that the condition precedent had happened. *Nekarda v. Presberger*, 107 N. Y. S. 897, 123 App. Div. 418.

Sec. 654. Petition not alleging agreement stated was made does not state a cause of action.

Plaintiff sued to recover commissions for effecting an exchange of property; the contract provided that the property conveyed by one of the parties was to be subject to a mortgage as by agreement to be made between the parties; there was no allegation that such agreement was ever made, or that there was ever an actual conveyance. *Held*, that the complaint did not state a cause of action. *Kahn v. Verschleiser*, 109 N. Y. S. 663, 57 Misc. 381.

Sec. 655. Petition asking judgment for excess over net price, on refusal to sell, demurrable.

An owner of certain realty listed it for sale with brokers, and agreed that he would sell the property so listed for a given sum net to him; the broker procured a purchaser able, willing and ready to buy at a price in excess of the amount named, but the owner refused to sell. *Held*, that the agreement did not import an offer on the part of the owner to pay the brokers the excess in the amount which the purchaser was willing to pay above the sum named for which the owner was willing to sell it, and a petition asking for judgment for the excess was demurrable. *Matheney, Beasley and Koon v. Godin*, 130 Ga. 713, 61 S. E. 703. See also Sec. 456.

Sec. 656. Petition sufficient without alleging sale for the purpose of defrauding plaintiff.

The petition of a broker for commissions, alleging the creation of an agency for the sale of land, that defendant authorized plaintiff to sell it for a certain amount, agreeing to pay him a fair per cent. commission therefor, and that defendant made a special agreement in writing to pay him such commission if plaintiff should sell or negotiate a sale to B., and that a few days thereafter defendant himself sold and conveyed the land to B. for a less consideration, and that said purchaser was procured by plaintiff, under the terms of the contract, states a cause of action, without any allegation that defendant made the sale with evil intent, or for the purpose of defrauding plaintiff. *Pierce v. Nichols* (Tex. Civ. App. '08), 110 S. W. 206.

Sec. 656a. Petition held not defective as alleging a contract in violation of broker's duty.

Defendant B., with whom G. had listed land for sale, learning that plaintiff desired to purchase it, requested to be permitted to make the sale, and informed plaintiff that he had G. bound to sell the land for \$2.50 per acre cheaper than G. would sell it to plaintiff. Plaintiff authorized B. to offer G. the amount he asked for the land, less \$72 interest on the land, if it could not be bought for less, B. agreeing not to close the trade with any other parties until plaintiff could buy the property at G.'s price. B. informed plaintiff that G. refused to take less than \$2,850 and the \$72 interest, and that the offer at that price would be kept open until the next day; but, pending the negotiations, B. and the two other defendants purchased the land for themselves, to plaintiff's damage. *Held*, that a petition alleging such facts was not defective as alleging a contract between plaintiff and B., which was invalid as a violation of B.'s duty to G. *Bass v. Talbert* (Tex. Civ. App. '08), 112 S. W. 1077.

CHAPTER V.

SECTION.

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- 663. Demurrer to answer lies for not showing modification of written contract.
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- 667. Amendment to set up unconscionable demand refused.

Sec. 657. Interpleader, when allowed.

Where two brokers claim the commissions for the same sale of land an interpleader will be awarded at defendant's instance. *Dreyer v. Rauch*, 3 Daly (N. Y.), 434, 42 How, Pr. 22; *Shipman v. Scott*, 12 Civ. Proc. R. 18 (N. Y.), 14 Daly, 233. *Contra, Brooke v. Smith*, 13 Pa. Cir. Ct. R. 557, 2 Pa. Dist. C. R. 767, 33 Weekly Notes Cas. 74. In an action by a real estate broker to recover commissions on a sale of property, defendant is entitled to an interpleader, where another broker claims commissions for the sale of the same property to the same purchaser on different terms. *Shipman v. Scott*, 14 Daly 233 (N. Y.).

In an action by a broker to recover commissions for selling land, it appeared that the vendor had paid another with knowledge of the broker's claim; there was no error in an instruction that the vendor was protected by the law, which author-

ized him to pay the money into court and compel the broker and the other claimant to litigate their rights, since the Code of Civil Procedure, Section 820, provides that a defendant may, where a person not a party to the action makes a demand against him for the same debt or property, apply for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of his debt. *Bickart v. Hoffman*, 19 N. Y. S. 472.

In an action by a broker for commissions on a sale of land, where another broker claiming the same commissions is substituted as defendant for the principal, he having paid the commissions into court, the principal's statement to one of the brokers, in the other's absence, that the absent broker had no authority to sell the land with a builder's loan, is properly excluded. *Shipman v. Frech*, 1 N. Y. S. 67.

Sec. 658. Interpleader, when not entitled thereto.

In an action by a broker against his principal for a commission on an alleged sale of land made by plaintiff for defendant, the latter is not entitled to file an answer in the nature of a bill of interpleader by alleging that another broker also claims commissions for making the sale. *Hurtsook v. Chrissman*, 114 Mo. App. 558, 90 S. W. 116.

A bill of interpleader will not lie at the suit of the seller to require two real estate agents to interplead as to which should have commissions on a sale of land, since, if either of them was entitled to commissions, it is because of some contract he had with the seller, and not because of anything that has happened between themselves. *Sachsel v. Farrar*, 35 Ill. App. 277.

Where plaintiffs sue defendant for a broker's commissions for the sale of certain land made through their agency, the action by a third person against defendant, in another suit, to recover for work, labor and services in the sale of the land, is not a demand against him for the same debt within the Code of Civil Procedure, Section 820, allowing an order of interpleader when competent creditors demand the same debt. *Taylor v. Satterthwaite*, 22 N. Y. S. 187, 2 Misc. 441.

Sec. 659. Demurrer lies to petition against broker for failure of title when.

In an action against a real estate agent for failure to examine the title of land purchased by him for plaintiff, the plaintiff alleged that the grantor had mortgaged the land and other land, and that the mortgage had been foreclosed and the land in question sold, without saying whether the grantor still retained title to the other lands mortgaged or their value, or that plaintiff applied for an order, in the decree for foreclosure, that such other lands be first sold, is demurrable. *Sears v. Forbes*, 122 Ind. 358, 23 N. E. 773.

Sec. 660. Demurrer lies to allegation that defendant neglected to collect rents.

In an action against an agent to recover for rents collected by him, and for damages for failure to collect rents, an allegation that defendant has "neglected said business, and hence has failed to collect rents with diligence he might have collected," is insufficient and demurrable. *Peeler v. Lathrop*, 48 Fed. 780.

Sec. 661. Demurrer lies to petition where only partial copies of letters constituting contract are given.

Where a petition sets forth letters alleged to have been written by the parties, and to have created the necessary written contract between the owner of the land and the broker, but does not purport to give full copies, neither is there any allegation that the letters were signed, the petition is subject to demurrer. *David Bradley v. Bower* (Neb. Sup. '04), 99 N. W. 490.

Sec. 662. Demurrer sustained where plaintiff sought to recover for loss of commissions from opposite party.

A complaint alleged employment by defendant as broker to exchange real estate, the offer of defendant's property under defendant's instructions, and acceptance of such offer, the notification of defendant thereof, and that defendant refused to proceed with the exchange and claimed the reasonable value of such services; a second count repeated the allegations of

the first, and claimed damages for the loss of commissions to be paid by the owners of the other property on completion of the exchange. *Held*, that the only contract alleged between defendant and its broker was an employment, that the employer contracted to pay the reasonable value of his services, and a demurrer to the second cause of action, on the ground that it did not state a cause of action, was properly sustained. *Mulhall v. Bradley & Currier Co.*, 63 N. Y. S. 782, 50 A. D. 179. See also Sec. 25.

Sec. 663. Demurrer to answer lies for not showing modification of written contract.

A complaint alleged that defendant agreed in writing to pay plaintiff \$300 if plaintiff would obtain a loan of \$3,000, and that plaintiff had fully performed; the answer alleged that defendant informed plaintiff that defendant must have the money within ten days, but that when defendant called on the parties who were to make the loan, he could not obtain the money, and that the same thing occurred several times, and that the negotiations extended over much more than ten days. *Held*, that the answer was demurrable as not showing a modification of the written contract, and in that it did not appear when the limitation began to run and when it terminated. *Burr v. Penfield*, 105 N. Y. S. 939, 55 Misc. 543.

Sec. 664. In Nebraska, demurrer lies to petition not showing agent's appointment was in writing.

In an action to recover compensation for services rendered as a real estate broker, a petition which discloses on its face that the contract of agency was not in writing is open to attack by demurrer. *Smith v. Aultz*, 78 Neb. 453, 110 N. W. 1015.

Sec. 665. Demurrer held improperly sustained in action to recover commissions paid recreant agent.

In an action by a principal against his agent to recover in part certain commissions alleged to have been erroneously paid, where, on an answer and counterclaim for the balance, the original action is dismissed, and the case is tried on the counterclaim, and the evidence of plaintiff shows that defendant,

while his agent in the purchase of lands, unknown to him received a commission from the agent of the vendor, is a sufficient defense to the action on the counterclaim, and a demurrer to such evidence was improperly sustained. *Plottner v. Chillian* (Okla Sup. '08), 95 P. 775.

Sec. 666. Motion to dismiss held properly denied.

In an action by a real estate broker, the complaint was made to set forth two causes of action; the first alleged that the contract between the parties provided for a commission for leasing and a commission for selling the property in question, and the fact of a lease procured through plaintiff; while the second merely alleged that the tenant thus procured also took and subsequently exercised an option to buy. *Held*, that as all the allegations might be taken together as stating only one cause of action for two commissions, the motion to dismiss the second cause of action was properly denied. *Downey v. Turner*, 51 N. Y. S. 105, 28 App. Div. 491.

Sec. 667. Amendment to set up unconscionable demand refused.

In an action to recover \$4,000, the residue of \$7,600 brokerage for negotiating a loan of \$4,000 for four months, the evidence did not support the allegations of the complaint, and the plaintiff was non-suited. *Held*, that it was immaterial that defendant did not specify for his motion a non-suit, as the complaint could not be corrected except by amendment, and that could not be granted because the demand was unconscionable. *Daley v. Russ*, 86 Cal. 114, 24 P. 867.

CHAPTER VI.

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669. Amendment allowing correction of written contract does not cause a departure.
670. Amendment, when error to refuse.

SECTION.

671. Amendment, error to allow to allege exercise of option and completion of sale.
672. Amendment to answer held improper and misleading.
673. Amendment of complaint, at trial, in furtherance of justice, held proper.
674. Amendment properly allowed plaintiff to claim return of commissions for fraud.

Sec. 668. Amendment, proper to allow to plead general denial, where answer set up statute of frauds.

Where the answer alleged that the contract of employment was oral, and "barred and invalid by the provisions" of a statute declaring that "contracts for the employment of an agent to sell real estate for commissions are invalid unless in writing subscribed by the party to be charged," and plaintiffs have failed to show a written contract of employment, it was not error to permit defendant to amend his answer by changing the admission of the contract of employment into a denial of the same. *Jamison v. Hyde*, 141 Cal. 109, 74 P. 695. But see *Strunski v. Geiger*, 101 N. Y. S. 786, 52 Misc. 134.

Sec. 669. Amendment allowing correction of written contract does not cause a departure.

Where the identity of the transaction on which plaintiffs based their claim to a judgment against the defendant and the form of the action as one sounding in contract were preserved in the amended petition, and this is the best and most reasonable test by which to determine whether or not an amend-

ment of a pleading substantially changes the cause of action so as to be obnoxious to the rule against departure, the amendment of the written contract does not constitute a departure. *Stewart v. Van Horne*, 91 Mo. App. 647; *Sain v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127.

Sec. 670. Amendment, when error to refuse.

Where the court voluntarily permits a broker suing for commissions to amend his complaint to show an assignment to him of a claim for commissions by A., it is error to refuse to allow him to amend for the purpose of showing an assignment of a portion of the claim from B., although the fact of such assignment appears in plaintiff's bill of particulars. *Schlesinger v. Jud*, 70 N. Y. S. 616, 61 App. Div. 453.

Sec. 671. Amendment, error to allow to allege exercise of option and completion of sale.

Where, in an action for commissions for a broker's services in the sale of a mine, a non-suit was granted, by reason of the fact that the option to purchase, negotiated by the broker, had not matured when suit was brought, and, pending a motion for a new trial for alleged errors of law occurring at the trial, the purchaser complied with the option and completed the sale, it was error to grant a subsequent application for a new trial, in order to permit the broker to allege by amendment the completion of the sale and recover for his services. *Lawrence v. Peterson*, 34 Wash. 1, 74 P. 1011.

Sec. 672. Amendment to answer held improper and misleading.

On the trial of a cause the defendant obtained leave to amend his answer by alleging "that after making the sales named they (plaintiffs) complained that the prices were too high as named by defendant, and made no effort to sell the same, but neglected the same, to the defendant's damage and injury." *Held*, that the matter involved in the amendment, not being pertinent to the case, was calculated to raise a false issue and distract the attention of the jury from the real question for their determination. *Marshall v. Goble*, 32 Neb. 9, 48 N. W. 898.

Sec. 673. Amendment of complaint at trial, in furtherance of justice, held proper.

In an action for a division of broker's commissions, it was proper to permit plaintiff to amend his complaint at the trial by inserting an allegation that defendant was the agent of a certain corporation, within certain years covering the transaction in question, which was the owner of the property sold, under the statute authorizing the court to permit the amendment of pleadings in the furtherance of justice. *McCleary v. Willis*, 35 Wash. 676, 77 P. 1073.

Sec. 674. Amendment properly allowed plaintiff to claim return of commissions for fraud.

In their original petition plaintiffs alleged that defendants engaged to sell plaintiffs' land at \$4,000, for a commission of \$125, but if only \$3,900 could be obtained the commission should be \$100; the land sold for \$4,000, but defendants fraudulently represented that only \$3,900 was obtained; that plaintiffs paid defendants a commission of \$100, and that they fraudulently converted \$100 of the price paid for the land, and asked judgment for \$75; later, plaintiffs were permitted to amend their petition by alleging that defendants through their fraud forfeited all right to commissions, and asked for recovery of commissions paid and the remainder paid. *Held*, that the amendment was properly allowed. *Deter v. Jackson*, 76 Kan. 768, 92 P. 546.

CHAPTER VII.

DEFENSES.

Sec. 675. That broker did not use best efforts insufficient.

An answer does not state a defense which admits the contract, and alleges that the broker did not use his best efforts and act in good faith, but fraudulently induced the defendant to agree to an exchange which he knew was not worth as much as defendant's property, is insufficient, where no direct averment of facts showing fraud is made. *Rabb v. Johnson*, 28 Ind. App. 665, 63 N. E. 580; *Meyer v. Payne*, 43 N. Y. S. 133, 13 N. Y. App. Div. 332.

Sec. 676. Setting up violation of law as to license insufficient.

An answer setting up the violation of a foreign statute requiring brokers to take out a license was held insufficient to show that the petition was founded on a criminal offense, or that the broker's contract was void or prohibited by statute, averments to that effect being held mere incidents and deductions from the statute, and not allegations of facts. *Angell v. Van Schinck*, 9 N. Y. S. 568, 56 Hun, 247. Nor can an agent sued for an accounting set up the illegality of transaction from which the money was realized. *Mechem on Ag.* Sec. 526.

Sec. 677. Affirmative defense not pleaded can not be proved.

An affirmative defense to be proved must be pleaded. *Kelly v. Stone*, 94 Iowa, 316, 62 N. W. 842; *Scott v. Dillon*, 109 N. Y. S. 877, 58 Misc. 522.

Sec. 678. Defense that plaintiff also acted for customer, to be proved, must be pleaded.

The defense that plaintiff was employed by both parties and his double employment not disclosed must, to be proved, be pleaded. *Childs v. Ptomey*, 17 Mont. 502, 43 P. 714; *Reese v.*

Garth, 36 Mo. App. 641; *Harrell v. Bonfils Imp. Co.*, 45 N. Y. S. 227, 17 A. D. 405; *Marks v. O'Donnell*, 121 N. Y. S. 214. Compare Sec. 869.

Sec. 679. Denying agreement will not admit proof of double employment.

Under a denial of an agreement for the payment of a commission, the broker's double employment can not be proved. *McFee v. Horan*, 40 Minn. 30, 41 N. W. 239; *Smith v. Soosan*, 35 N. Y. S. 806, 24 Misc. 706; *Annabil v. Traverse Land Co.* (Minn. Sup. '09), 121 N. W. 233.

Sec. 680. Denying allegations, except that plaintiff is a broker, admits proof of double employment.

This defense, double employment, may be proved under a denial of all the allegations of the complaint except that plaintiff was a broker. *Wolf v. Demboskey*, 74 N. Y. S. 465, 36 Misc. 643, 66 A. D. 428.

Sec. 681. Denying performance of services by broker admits proof of double employment.

Under an answer merely denying the performance of the services by the broker his double employment may be proved. *Norman v. Reuther*, 54 N. Y. S. 152, 25 Misc. 161.

Sec. 682. That services were rendered under an express contract inadmissible under general denial.

In an action to recover the reasonable value of services for procuring a purchaser of land, a defense that the services were rendered under an express contract as to compensation is inadmissible under the general denial, the action being to recover upon a *quantum meruit*; if defendant relied upon an express contract in respect to plaintiff's corporation, he should have pleaded it. *Reishus-Remer Co. v. Benner*, 91 Minn. 401, 98 N. W. 186. Compare Sec. 696.

Sec. 683. Under general denial can not prove transaction cancelled by consent of all.

In an action brought by real estate brokers for commissions, the defendant cannot under a general denial be permitted

to show that subsequent to the procurement of the customer and the execution by him of a written agreement to purchase, the entire transaction including the agreement to purchase was cancelled by consent of all parties. *Rothschild v. Barrett*, 47 Minn. 28, 49 N. W. 393.

Sec. 684. Under a general denial may show no commissions chargeable unless excess in price received.

In an action by a broker for commissions for selling land under an alleged contract providing for a specified sum as commissions, defendant may under a plea of general denial show that plaintiff agreed to charge no commissions unless the land was sold for more than a stated price, since that is not affirmative matter of defense. *Wein v. Gilmer*, 81 Tex. 345, 16 S. W. 1058.

Sec. 684a. Defense that contract had been rescinded admissible, though not specially pleaded.

In an action by a broker for compensation, defense that the contract between the broker and defendant had been rescinded held admissible, though not specially pleaded. *Mott v. Minor*, (Cal. App. '09), 106 P. 244.

Sec. 685. Under a general denial can not prove another than plaintiff introduced the purchaser.

In an action by a real estate broker for commissions, where the answer is a general denial, the proof is restricted to sustaining or controverting the facts stated in the petition, and defendant cannot show that a third party and not the plaintiff introduced the purchaser to the defendant. *St. Felix v. Green*, 34 Neb. 800, 52 N. W. 821; *Reese v. Garth*, 36 Mo. App. 641.

Sec. 686. Plaintiff is not bound to negative defense of abandonment of employment.

In an action for a broker's commissions, an alleged abandonment of the broker's employment to sell is matter of defense which the plaintiff is not bound to negative. *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622.

Sec. 687. That owner offered to perfect title by suit at law no defense to action by broker for commissions.

The fact that the owner offered the prospective purchaser to perfect his title by suit at law is no defense to an action for commissions. *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723.

Sec. 687a. Sale by owner at higher price no defense to broker's suit for commissions for producing a buyer.

Where plaintiff was employed by an executor to sell land of the estate, and plaintiff procured a purchaser in accordance with the required terms, the fact that the property was sold to another offering a higher price was no defense to plaintiff's right for commissions. *Hickman-Coleman Co. v. Leggett*, (Cal. App. '09), 100 P. 1072. Compare Secs. 15, 454

Sec. 688. When sued for commissions can not set up defect which stated at the time might have been cured.

Where one who employed a broker to purchase for him land at a specified price, absolutely refused to complete the transaction, he cannot, at the trial of the broker's action for commissions, set up a defect in the title which if expressed at the time, might have been obviated. *Auten v. Jacobus*, 47 N. Y. S. 1119, 21 Misc. 632, affirming 46 N. Y. S. 681, 20 Misc. 669.

Sec. 689. Defendant can show another agent made the sale.

In an action to recover commissions for a sale of real estate, defendant can show that another authorized agent made the sale. *Goin v. Hess*, 102 Iowa 140, 71 N. W. 218; *Cook v. Whiting*, (Iowa Sup. '09), 122 N. W. 835; *Russell v. Poor* (Mo. App. '08), 115 S. W. 1.

Sec. 689a. What purchaser may show in defense of action to dispossess.

Where the agent having authority to sell lands for his principal makes a contract in writing for a sale of the same in his own name and puts the purchaser in possession thereof, who makes thereon lasting and valuable improvements, and the purchaser is afterward sued by the principal for the recovery of the land, the purchaser may, with proper allegations in his

answer, show the intention of the parties to have been that the principal should be bound by the contract. *Butler v. Kaulback*, 8 Kan. 668. Compare, *Taylor v. Guest*, 45 How. Pr. (N. Y.) 276.

Sec. 690. That authority was conditional on defendant's ability to buy another lot.

In an action by a real estate agent for commissions for a sale of land, the defense was that the authority to sell was conditioned on defendant's being able to purchase a certain other lot. *Held*, That it was competent for defendant to show that he made reasonable effort to make such purchase, as such proof showed his good faith. *Wilson v. Klein*, 90 Ala. 518, 8 S. 130.

Sec. 691. That contract obtained was provisional and no lease was made.

Plaintiffs, real estate agents, were to receive certain commissions for services in securing a lessee for defendant upon agreed terms, and they procured an informal agreement for a lease to be signed by defendant and the applicant for the lease. *Held*, That to defeat an action by plaintiff for commissions defendant might show by parol that the contract was merely provisional, and did not express all the terms of the lease to be entered into by the parties, and that the lease was never consummated, because no final agreement was ever made between the defendant and the proposed lessee. *Burton v. Beal*, 49 Minn. 230, 51 N. W. 918; *Laws v. Schmidt*, 80 Ohio St. 108, 88 N. E. 319.

Sec. 691a. Defendant, under a general denial, may show that contract was merely an option.

Defendant, under his general denial, in an action for broker's commissions, in which the complaint avers that plaintiffs procured R. to purchase the premises of defendant for an agreed amount, and that said contract was reduced to writing signed by defendant, may show that the contract made by defendant and R. was merely an option. *Brown v. Wisner* (Wash. Sup. '09), 99 P. 581.

Sec. 691b. Evidence showing contract an option and not a sale.

The rule excluding parol evidence to vary a written contract obtains only between the parties thereto, or their successors in interest, so that defendant, in an action for a broker's commissions for procuring a purchaser by R of land from defendant, may show that the contract between R. and defendant, even though in form one of sale, was merely an option and not acted on by R. *Brown v. Wisner*, 51 Wash. 509, 99 P. 581.

Sec. 692. That defendant sold premises before sale by plaintiff inadmissible under a general denial.

Where the answer is a general denial, the issue presented by the pleading is the truth of the allegations of the petition; under such an issue affirmative proof in favor of the defendant cannot be received, and an instruction submitting such proof to the jury is erroneous; hence, evidence offered by defendant that he sold the premises to other parties before the sale by plaintiff is inadmissible. *Griffith v. Woolworth*, 44 N. W. 1137, 28 Neb. 715.

Sec. 693. Defense of collusion with proposed purchaser and bad faith allowable.

In an action for broker's services, an answer alleging that the proposed purchaser was plaintiff's uncle, and that they entered into collusion, whereby the uncle was to pretend to defendant that he was ready and willing to purchase the land and pay for the same in cash, and that defendant under the belief that the proposed purchaser was acting in good faith fixed a day and place for the execution of the deed, when plaintiff and his uncle questioned the description for the purpose of delay, and that before the adjourned day fixed for the execution of the deed, defendant was informed that the proposed purchaser would not take the land, until he had had an opportunity of reinspecting it, which he never did, stated a sufficient defense. *McAfee v. Bending*, 36 Ind. App. 628, 76 N. E. 412.

Sec. 693a. Defense of fraudulent representations of agent available against his assignee.

It is a good defense for procuring a contract for defendant that the services were rendered without any effort or influence

of plaintiff's assignor, and that the agreement relied on by plaintiff was induced by his assignor's fraudulent representations. *Sand v. Kenny Mfg. Co.*, 113 N. Y. S. 972.

Sec. 693b. Voluntary payment by the defrauded party no defense to agent sued for the deceit and fraud.

The voluntary payment of the balance of the price of the mine bought by his agent, after the purchaser entered into and partly executed the contract to buy the property, is no defense to the agent sued for deceit and fraud in the transaction. *Gt. Western Gold Co. v. Chambers* (Cal. Sup. '09), 101 P. 6.

Sec. 694. After contract accepted by vendor latter can not plead irresponsibility of purchaser to action by broker for fees.

Where a broker, under a general contract of employment to sell real estate, obtained a purchaser satisfactory to his principal who made an enforceable contract of sale, without being induced so to do by any representations of the broker as to the purchaser's responsibility, and without any bad faith on the broker's part, the latter was entitled to commissions, though, without the principal's fault, the vendee failed to perform the contract of sale, because of the lack of sufficient financial responsibility at the time the contract was executed. *Alt v. Doscher*, 186 N. Y. 566, 79 N. E. 1100; *J. B. Watkin's Ld. Mfg. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72; *Sanderson v. Wellsford* (Tex. Civ. App. '09), 116 S. W. 382. *Contra, Dotson v. Milliken*, 27 App. (D. C.), 500. See also Secs. 726, 842.

Sec. 694a. Proofs available to defendant under his denial that customer was able to exchange.

In an action by brokers for services in negotiating an exchange of real property, which was not carried out, even if plaintiffs made *prima facie* proof of title in the customer offered by them, defendant under his denial that the customer was able to exchange, could prove that he was not able, because he had no title to part of the real property proposed to be exchanged, and that it was incumbered by a party-wall which made it unmarketable. *Mutchnick v. Davis*, 114 N. Y. S. 997.

Sec. 695. Answer averring willingness to sell on terms set forth states no defense.

In an action to recover an agent's commissions for finding a purchaser of real estate, where the plaintiff alleged that defendant had agreed to pay a certain sum for the finding of a purchaser at \$100 per acre, and that plaintiff found such purchaser, who offered to purchase and pay for the land either in cash or on such terms as the defendant might desire as to payment, an answer denying that defendant ever employed plaintiff, but averring a willingness to sell and convey to the alleged purchaser at \$100 per acre, payable in five equal installments, bearing interest at ten per cent. per annum until paid, principal and interest to constitute part of the purchase price of the land, constitutes no defense to the action, the allegation in the complaint that the purchaser offered such terms as the defendant might desire as to payment being mere surplusage. *Guthrie v. Bright*, 26 Ky. L. R. 1021, 82 S. W. 985.

Sec. 695a. It is no defense that the broker agreed to divide his commissions with third persons.

It is no defense to an action for commissions on a sale of land that the broker agreed with third persons that they should all endeavor to make a sale, and would divide the commissions in the event thereof. *Ross v. Carr*, (N. M. Sup. '09), 103 P. 307.

Sec. 696. Under general denial can prove contract made and non-performance by plaintiff.

In an action on an express contract for commissions for procuring purchasers of land, the defendant was entitled under a general denial to offer testimony, not only denying the contract as claimed, but also proving the contract which they in fact made, and non-performance thereof by the plaintiff. *Tracey Land Co. v. Polk, etc. Co.*, 131 Iowa 40, 107 N. W. 1029; *Harris v. Moore*, 134 Iowa, 704, 112 N. W. 163; *Weaver v. Richards*, 156 Mich. 320. Compare Sec. 682.

Sec. 697. Statute of frauds not available as a defense to action by broker for commissions.

In an action to recover commissions or compensation for a sale of land by a broker, that the contract with the broker was within the statute of frauds is no defense. *Stephens v. Bailey*,

149 Ala. 256, 42 S. 740; *Kepner v. Ford* (N. Dak. Sup. '07), 111 N. W. 619; *Pope v. Caddell*, 31 Ky. L. R. 412. 102 S. W. 327.

Sec. 698. Answer that "sale was not consummated and plaintiff not entitled to recover" no defense.

In an action to recover a commission for a sale of defendant's property, an allegation in the answer that the sale "was not consummated, by reason of which plaintiffs are not entitled to recover of defendants," states no defense, as such failure may have resulted from defendants' fault, they having admitted that plaintiff furnished them a purchaser. *Atterbury v. Hopkins*, 122 Mo. App. 172, 99 S. W. 11.

Sec. 699. To establish illegality of oral appointment of broker the defense must be specially pleaded.

When, in an action for commissions earned by a broker under an oral contract of employment to procure a purchaser of real estate, no illegality in the contract appeared on the face of the complaint or in the evidence to sustain the action, the defense that under the penal code a written authorization to procure a purchaser of real estate is necessary must to be available be specially pleaded. *Strunski v. Geiger*, 101 N. Y. S. 786, 52 Misc. 134. Compare, *Jamison v. Hyde*, 141 Cal. 109, 74 P. 695.

Sec. 700. Where agent acted for both parties by consent, allegation of bad faith by defendant states no defense.

The only fraud charged by the answer, in an action by real estate agents for commissions for trading defendant's land being that plaintiffs were in the employ of the other party to the trade when they were employed by defendants, which fact of dual employment plaintiffs by their reply admitted and justified. on the ground that it was with the knowledge and consent of both parties, defendants cannot avail themselves of the defense that plaintiffs acted in bad faith toward both parties by each attempting to testify as to the value of the land of the other. *Cook v. Platt*, 126 Mo. App. 553, 104 S. W. 1131.

Sec. 700a. Broker's refusal to pay part of costs no defense to action for his commissions.

Where a broker bound a purchaser by an enforceable contract, the broker's refusal to fulfill a promise to pay one-half of the

costs of the seller's suit to enforce the contract was no defense to the broker's right to commissions. *Pinkerton v. Hudson* (Ark. Sup. '08), 113 S. W. 35.

Sec. 701. Put in issue by general denial, and not necessary to plead sale not consummated.

Where, in an action for a real estate broker's commissions to be paid on securing a purchaser, plaintiff relied upon an agreement for a sale made by the owner to a prospective purchaser secured by the broker, it was not necessary for the owner to plead that the contract was not consummated by a sale, his general denial putting in issue the fact of a sale, that being necessary to entitle the broker to recover. *Wilson v. Ellis*, (Tex. Civ. App. '08), 106 S. W. 1152; *Arthur v. Porter* (Tex. Civ. App. '09), 116 S. W. 127.

Sec. 702. That interest terms differed no defense where plaintiff offered to pay the difference.

Where brokers procured a purchaser ready, able and willing to purchase on defendant's terms, it was no defense to an action for commissions that the memorandum of sale did not provide for exactly the same interest terms that defendant demanded, plaintiffs having offered at the time to pay the difference. *Ricker v. Post*, 110 N. Y. S. 79, 125 App. Div. 607. Compare, *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228.

Sec. 703. Averment not objectionable as amounting to the general issue.

A plea to a declaration by real estate brokers for commissions averring that the brokers did not sell the property to the purchasers named for the owners for the amounts named, and that the purchasers did not pay the owners such amount for the property, and that the owners never were indebted as averred, was not bad as amounting only to the general issue, as a plea is not objectionable on that ground, unless it sets up matters of fact merely amounting to a denial of such allegations in the declaration as on general issue would have to be proved to support the case. *Seff v. Brotman*, 70 A. 106, 108 Md. 278.

CHAPTER VIII.

SECTION.

704, 704a. What are not departures.

SECTION.

705 to 728c, inclusive. Examples on the question of burden of proof.

Sec. 704. What are not departures.

Where defendant agreed to pay commissions for sales of lands to customers "procured" by plaintiffs, an instruction that defendants were liable if plaintiffs "furnished" customers, is not a departure from the issues made. *Boyd v. Watson*, 101 Iowa 214, 70 N. W. 120. A petition alleged that defendant promised to pay plaintiff and another a commission for selling defendant's farm, but refused to pay the same on sale of the farm, an amended petition alleged in the first count that defendant had promised to pay plaintiff a commission for selling the farm, but had paid one-half thereof; the second count alleged that defendant agreed to pay plaintiff and another a certain sum each for selling the farm, but that on sale thereof refused to pay plaintiff his part of the commissions. *Held*, that the amended petition did not embrace a different cause of action from that pleaded in the original petition, there being nothing in either of the pleadings to indicate that plaintiff intended to charge the existence of a partnership relation between himself and the other agent acting with him in selling the farm. *Sain v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127.

Sec. 704a. No variance between allegations and proof.

In an action to recover commissions for procuring a loan, there is no variance between an allegation that plaintiff procured a loan for defendant, and evidence that at defendant's request and on his promise to pay a commission, plaintiff procured a loan to be made by a corporation formed by defendant, and a common count that plaintiff performed work for defendant, of the price and value of a certain sum, authorized a finding

that defendant agreed to pay plaintiff the usual commissions or the reasonable value of his services. *Williams v. Clowes*, 75 Conn. 155, 52 A. 820.

Sec. 705. Burden of proof on defendant that broker's authority was revoked.

One who has given a broker authority until further notice to sell land has the burden of proving that he revoked the authority before the broker found a purchaser. *Bourke v. Van Keuren*, 20 Colo. 95, 36 P. 882; *Clements v. Stapleton*, 136 Iowa 137, 113 N. W. 546.

Sec. 706. Burden on plaintiff to show double employment was with defendant's knowledge and consent.

The burden of showing that one employing a broker to find a customer to exchange real estate with him had notice that the broker was to receive a commission from the customer is on the broker. *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; *Robinson v. Clock*, 55 N. Y. S. 976, 38 App. Div. 67. Compare, *Redmond v. Henke*, 137 Iowa, 228, 114 N. W. 885.

Sec. 706a. Burden on broker to show not only that the seller knew of double agency, but the purchaser as well.

Whenever a real estate broker, who is representing the purchaser may recover commissions from the seller, the broker must prove, not only that the seller, but the purchaser as well, was aware of his double agency, and that the trade was made with such knowledge. *Denison v. Gault*, 132 Mo. App. 301, 111 S. W. 844. See also Sec. 559.

Sec. 707. Burden of agent's want of authority is on party making allegation.

The burden of proving want of authority, where the agent executes a contract in the name of the principal, lies on the party claiming the want of authority. *Plumb v. Milk*, 19 Barb. (N. Y.) 74.

Sec. 708. Burden is on agent to establish fairness in transaction.

The burden of proof is on the agent to establish his fairness in the transaction. *Rubidoeux v. Parks*, 48 Cal. 215; *Brown*

v. Post, 1 Hun (N. Y.), 303; *Neely v. Anderson*, 2 Strob. (S. C.) Eq. 262; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Alwood v. Mansfield*, 59 Ill. 496; *Hanna v. Haynes*, 42 Wash. 284, 84 P. 861; *Walker v. Carrington*, 74 Ill. 446; *Lienwen v. Kline* (Iowa Sup. '09), 120 N. W. 312. *Contra*, *Buckingham v. Harris*, 10 Colo. 455, 15 P. 817; *Pollatschek v. Goodwin*, 40 N. Y. 682, 17 Misc. 587.

Sec. 709. Burden of proof as to knowledge on part of principal of dual agency.

The burden of proving knowledge on the part of the principal, in some States, rests on the agent. *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139; *Lynch v. Fallon*, 11 R. I. 311; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279. In Georgia, the burden of proving knowledge on the part of the principal rests on the latter, and when dual agency was relied on it was necessary for the defendants to prove not only the fact of such agency, but that the same was not known to both parties. *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674; *Hansley v. Monroe*, 103 Ga. 279, 29 S. E. 928.

Sec. 710. Burden on selling broker that principal consented to the broker purchasing the property.

If an agent employed to sell property buys it for himself, in an action for compensation the burden of proving that the principal had knowledge of the facts and consented to the sale rests on the agent. *Janson v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Grant v. Hardy*, 33 Wis. 668.

Sec. 711. Burden on broker to prove authority of owner's agent to employ him.

If the contract is executed by the owner's agent, in order to recover commissions the broker must prove the agent's authority to make it. *Stinde v. Scharff*, 36 Mo. App. 15.

Sec. 712. Broker bears the burden of proving his employment.

In an action by a broker against his principal for compensation, plaintiff bears the burden of proving by a preponderance of the evidence that he was employed by defendant to find a

purchaser and that he found a responsible one. *Hammond v. Mitchell*, 61 Ill. App. 144; *Harrison v. Prestroski*, 97 Iowa 166, 66 N. W. 93; *Chilton v. Butler*, 1 E. D. Smith, 150; *Schatzberg v. Grosworth*, 84 N. Y. S. 259; *Harrel v. Veath*, 13 N. Y. St. 738; *Summa v. Dereskiawicz* (Conn. Sup. '09), 74 A. 906; *Balentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037; *Rice v. Neuman*, 115 N. Y. S. 83.

Sec. 712a. What broker must show to recover on an implied contract.

A real estate broker seeking to recover commissions for procuring a purchaser of real estate, under an implied contract, must show that he rendered his services under an honest belief, reasonably indicated by the owner's conduct, that a request had been made of him by the owner to render the services, or under such circumstances, in the absence of a request, as indicated that he expected to be paid therefor, and that the owner, knowing the circumstances, availed himself of the benefit of the services rendered. *Summa v. Dereskiawicz*, (Conn. Sup. '09), 74 A. 906.

Sec. 713. Broker who claims must prove exclusive right of sale.

A real estate broker who founds his right of action for commissions on the owner's agreement to give him the sole and exclusive right of sale of the property, and alleges a breach of such agreement and a sale effected by the owner, must prove that such an agreement was entered into. *Wychoff v. Taylor*, 13 Daly (N. Y.) 564. See also Sec. 13.

Sec. 714. Broker must prove direct employment, ordinary agency of wife for husband insufficient.

To sustain an action for commissions, the broker must show direct employment by the principal or a direct authority for him to treat with the agents of the principal, and if the agency of a wife for her husband be relied upon, special authority or ratification must be shown. *Harper v. Goodall*, 10 Abb. N. Cas. (N. Y.) 161, 62 How. Pr. 288; *Harrell v. Vieth*, 13 N. Y. St. 738.

Sec. 715. Burden of proof on defendant claiming contract signed conditionally.

Where plaintiff, in an action to recover commissions for procuring a purchaser for real estate, proves the execution of the contract of purchase which defendant claims was signed conditionally, the burden of proving such defense is on the defendant. *Folinsbee v. Sawyer*, 36 N. Y. S. 405, 15 Misc. 293.

Sec. 716. Burden is on plaintiff to show performance of obligations assumed.

Plaintiff bears the burden of proving that he performed his obligation by effecting a purchase, procuring a responsible purchaser or making an enforceable contract of sale in accordance with his instructions. *Hammond v. Mitchell*, 61 Ill. App. 144; *Leahy v. Hair*, 33 Ill. App. 461; *Davis v. Gassette*, 30 Ill. App. 41; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Peet v. Sherwood*, 47 Minn. 347, 50 N. W. 241, 929; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Kirvin v. Barney*, 57 N. Y. S. 812, 27 Misc. 181; *Kirvin v. Barney*, 61 N. Y. S. 122, 29 Misc. 614; *Cooper v. Lawrence*, 110 N. Y. S. 238; *Geiger v. Keiser* (Colo. Sup. '10), 107 P. 267; *Kalkstein v. Jackson*, 116 N. Y. S. 302.

Sec. 717. If principal refuses customer broker must prove his ability to perform.

If the principal refuses to accept the customer furnished by the broker, in an action to recover commissions the broker must prove the customer's ability to complete the transaction. *Colburn v. Seymour*, 32 Colo. 430, 76 P. 1058; *Fay v. Ryan* (Ill. Sup. '09), 88 N. E. 974; *Dent v. Powell*, 93 Iowa 711, 61 N. W. 1043; *Russell v. Hurd*, 113 Ill. App. 63; *Coleman v. Meade*, 13 Bush (Ky.) 358; *Staehlin v. Kramer*, 118 Mo. App. 329, 94 S. W. 785; *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627. Burden on defendant to prove irresponsibility of the purchaser. *Cook v. Kronke*, 4 Daly (N. Y.), 268.

Sec. 718. Purchaser asking specific performance must show validity of broker's authority.

Where, in a suit to set aside a contract for the sale of land as a cloud on the title, the purchaser insisted on a decree for specific performance, and the broker a judgment for commis-

sions, the burden of showing the validity of the broker's authority to make the sale rested on the purchaser and on the broker. *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213.

Sec. 719. Burden on broker to prove third person able and willing to advance cash payment to purchaser.

The purchaser was unable to buy the land, but a third person agreed to furnish the money necessary to make the cash payment; the sale was not made. *Held*, That the broker, in order to recover his commissions, must prove, not only that the purchaser was ready and willing to buy, but that the third person was ready, able and willing to advance the cash payment. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627. Also that purchaser has cash in hand, where that is a prescribed condition. *Watters v. Dancey* (S. Dak. Sup. '09), 122 N. W. 430.

Sec. 719a. What necessary to prove before contract became binding.

Where, in an action by a broker for commissions for the sale of real estate, it was shown that defendant contracted with a third person for an exchange of property, "subject to inspection of land furnished by each party," within fifteen days, otherwise the trade should be considered closed, and that defendant refused to carry the contract into effect; the broker, in order to recover, must show a failure of defendant to inspect the land of the third person, for the right to recover would not be made out without proof that the contract between the defendant and the third person became binding by defendant's failure to inspect. *Stotts v. Miller*, 128 Iowa, 633, 105 N. W. 127.

Sec. 720. Burden on broker who claims right to retain commissions out of purchase money.

Where an agent claims the right to retain commissions out of the price received on a sale of land of his principal, the burden of proof is on him to show a legal right to retain his principal's money as commissions. *Knott v. Midkoff*, 114 La. 234, 34 S. 153.

Sec. 721. Defendant alleging plaintiffs were to get wife to join in contract must prove.

Where, in an action to recover commissions for a sale of defendant's homestead, their answer alleged that plaintiffs were

to procure the wife to join in the contract, and that she refused to do so, the burden was on the defendant to prove such fact. *Marlin v. Sipprell*, 93 Minn. 271, 101 N. W. 169.

Sec. 722. Burden on broker that he had required written authority to make the sale.

In an action by a broker to recover commissions for selling land, plaintiff had the burden of showing that at the time he made the sale, he had the written authority required by statute. *Turner v. Lane*, 93 N. Y. S. 1083, 47 Misc. 387.

Sec. 723. Burden on sub-agent that broker had authority to employ him.

Where negotiations for a lease are with a broker of the owner of the premises, the burden is on the sub-agent claiming commissions to show that the broker had authority to employ him, as a broker authorized to lease premises presumptively is not authorized to employ a sub-agent. *Southback v. Ireland*, 95 N. Y. S. 621, 100 App. Div. 45. Compare, *Madler v. Pogorski*, 124 Wis. 477, 102 N. W. 892.

Sec. 724. Burden on broker to show payment or not collected through fault of owner.

A contract of agency to sell land provided that if the cash payment of any sale was equal to \$3.50 per acre the broker should receive his commissions in full, but if less, then the broker should receive only one-half of his commissions, the other half to be paid when the second installment was collected from the purchaser. *Held*, in an action to recover the balance of commissions on land sold, that, where half the commissions had been received, the agent must show, either that the second installment had been paid to the owner, or that it had not been collected by reason of the owner's fault. *Burnet v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Larson v. Burroughs*, 116 N. Y. S. 358.

Sec. 725. Burden on broker to prove agreement to sell was made and the customer able and willing to perform.

A real estate broker employed to procure a purchaser of land for a fixed price, or any other price below that consented to by

the owner, has the burden of proving that he produced a person with whom the owner reached an agreement of sale or exchange, and that such person was able and willing to carry out such agreement, in order to recover the commissions provided for. *Hunt v. Tuttle*, 133 Iowa 647, 110 N. W. 1026; *Blackledge v. Davis*, 129 Iowa, 591, 105 N. W. 1000; *Watters v. Dancey*, (S. D. Sup. '09), 122 N. W. 430.

Sec. 725a. What a loan broker must show to recover where loan is not consummated.

A loan broker, where the loan is not consummated, must at least show the procurement of a person able and willing to accept it upon the precise terms stipulated by his principal. *Strauss v. Eastern Brewing Co.*, 118 N. Y. S. 806.

Sec. 726. On accepted contract burden of proof on owner to show irresponsibility of buyer.

Where the principal accepts the purchaser found by his broker, without questioning his ability to perform, and the sale fails of consummation by the purchaser's own fault or failure to make good his offer, the burden is on the principal in order to defeat the broker's right to compensation, to show the purchaser's want of ability. *Dodson v. Milliken*, 27 App. (D. C.) 500; *Phinizy v. Bush*, 129 Ga. 479, 59 S. E. 259; (In many States owner bound by acceptance.) Compare Secs. 694, 842.

Sec. 727. Broker must prove performance within a reasonable time.

A broker employed to procure a purchaser of real estate under a contract which does not specify the time for the performance of the contract must, in an action for his commissions, prove that he performed it within a reasonable time. *Harris v. Moore*, 134 Iowa 704, 112 N. W. 163; *Hurst v. Williams*, 31 Ky. L. R. 658, 102 S. W. 1176. On acceptance immaterial. *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622.

Sec. 728. Burden of proof on defendant when he alleges plaintiff was agent of tenant.

Where, in an action by a broker for commissions for procuring a tenant for defendant, the defense was that the broker was

the agent of the tenant procured, the burden of proof was on defendant to show the existence of such agency. *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037.

Sec. 728a. Vendee suing to recover money paid vendor's agent on unauthorized contract has burden of proving vendor's ratification.

A vendee suing the land owner to recover money paid his agent on an unauthorized contract of sale made by the latter, has the burden of proving ratification by the land owner. *Edwards v. Davidson* (Tex. Civ. App. '04), 79 S. W. 48.

Sec. 728b. Burden of proof as to double payment of commissions.

Where, in an action to recover an alleged double payment of a real estate agent's commissions, defendants claimed that the second payment was for other services, and that the receipt executed therefor had been given to plaintiff's agent, who had knowledge of the previous payment of the commissions, an admission of such prior payment, and the execution of such receipt did not shift the burden of proof to the defendants to show that the second payment was not for services previously paid for. *Phelps v. Miller* (Tex. Civ. App. '04), 83 S. W. 218.

Sec. 728c. Burden on broker to show defect in owner's title which defeated sale.

Where a broker procured one who was willing to purchase the land of his principal but for a defect in the title, in an action to recover his commissions, the burden is on the broker to show that such defect existed, no binding contract of purchase having been made. *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819.

CHAPTER IX.

EVIDENCE—ADMISSIBLE.

Sec. 729. Oral agreement, where correspondence does not cover compensation.

Where the correspondence by which plaintiffs were employed to sell land does not cover the question of compensation, a former oral agreement as to compensation to be charged may be shown, but where the contract by correspondence refers to a sale of lots at specified prices and terms, evidence of a former oral agreement that the sale should be made subject to defendant's approval, and that the deed should contain certain conditions, is inadmissible. *Sayre v. Wilson*, 86 Ala. 151, 5 S. 157.

Sec. 729a. Contract of employment admissible to prove value of services rendered by broker.

Where a broker introduces a prospective purchaser to the seller, and the latter undertakes to conduct the negotiations and finally sells the property for less than the terms named in the contract of employment, the original contract is admissible, in an action by the broker, as a basis for the ascertainment of reasonable compensation. *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381.

Sec. 730. Writing reciting payment of consideration as tending to prove broker's services.

A written agreement entered into by plaintiffs' customer for the purchase of property and reciting the payment of part of the stipulated price to plaintiffs, is admissible as tending to show that plaintiffs rendered services in effecting a sale of the property. *Rothschild v. Burritt*, 47 Minn. 28, 49 N. W. 393; *Tebo v. Mitchell*, 5 Pennewill (Del.), 356, 63 A. 327.

Sec. 731. Deed of principal to show ratification of broker's contract.

A deed executed by the principal to the purchaser after the commencement of the suit, is admissible to show the principal's ratification of the broker's contract. *Gelott v. Ridge*, 117 Mo. 553, 23 S. W. 882.

Sec. 732. Written contract of sale to show sale was made.

The written contract of sale executed by plaintiffs as defendant's agents is admissible to show that the sale was made, although the agents had no written authority to make it, and it was afterwards repudiated by the defendant. *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Johnson v. Buchanan* (Tex. Civ. App. '09), 116 S. W. 875; *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15; *Cutter v. Pearsoll*, 146 Cal. 690, 81 P. 25; *Snyder v. Fidler*, 125 Iowa, 378, 101 N. W. 150.

Sec. 733. Newspaper advertisement to show efforts of brokers to sell the property.

A newspaper advertisement published by plaintiffs is admissible as showing what they did in performance of their duty under the contract to sell the property. *Decker v. Widdicomb*, 137 Mich. 331, 100 N. W. 573.

Sec. 733a. Broker may testify he advertised lands in newspaper.

A real estate broker suing for commissions may testify that he advertised the land in a certain newspaper, no effort being made to prove in this manner the terms or contents of the advertisement. *Yarborough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645.

Sec. 734. Memoranda made by the parties.

A memorandum signed by the parties to proposed sale is admissible in evidence. *Folinsbee v. Sawyer*, 28 N. Y. S. 698, 8 Misc. 370.

Sec. 734a. Contract and release admissible in evidence.

In an action for broker's commissions for procuring a tenant for premises, wherein defendant claimed plaintiff agreed to

forego the payment of his commissions until payment of the rent by the tenant, the complaint, in an action by defendant against the tenant for specific performance of the contract procured by plaintiff, and the release subsequently executed to the tenant are admissible, not only as an admission of the contract, but to show that there was an agreement by plaintiff to postpone payment of commissions; defendant had voluntarily put it out of his power to collect such rent. *Benedict v. Pincus*, 119 N. Y. S. 266.

Sec. 735. Conversations, when pertinent to the issues.

In an action for commissions on a sale of real estate, evidence of negotiations between plaintiff and the customer afterward communicated to defendant is admissible. *Luhn v. Fortran* (Tex. Civ. App. '09), 115 S. W. 667; *Huff v. Cole*, 127 Mich. 351, 86 N. W. 835; *Kurinsky v. Lynch* (Mass. '09), 87 N. E. 70; *Benedict v. Dakin* (Ill. Sup. '09), 90 N. E. 712; *Leonard v. Roberts*, 20 Colo. 88, 36 P. 880; *White v. Collins*, 90 Minn. 165, 95 N. W. 765; *Woolley v. Lowenstein*, 31 N. Y. S. 570, 83 Hun, 155; *Brumfield v. Potter, etc., Mfg. Co.*, 23 N. Y. S. 1025, 4 M. 194; *Richardson v. Babcock*, 119 Wis. 141, 96 N. W. 554; *McDonald v. Smith*, 99 Minn., 42, 108 N. W. 291; *Fortran v. Stevens*, 113 S. W. 312 (Tex. Civ. App. '08).

Sec. 736. Conversations after the sale are not admissible.

Conversations between a broker and the purchaser after the sale are inadmissible. *McDonald v. Ortman*, 98 Mich. 40, 56 N. W. 1055; also, between plaintiff and proposed purchaser, in the absence of defendant. *Rutherford v. Selover*, 87 Minn. 495, 92 N. W. 413. Likewise, between buyer and seller before and after the execution of the contract of sale, it affects the broker. *Veazie v. Parker*, 72 Me. 443.

Sec. 737. Letter of broker to purchaser's agent to prove efforts to make a sale.

In an action by a broker to recover from the seller of real estate, commission for procuring a purchaser, the question was whether a letter written by the broker to the purchaser's agent was admissible to prove his efforts to make a sale; and com-

petent as part of the *res gestae* to show what the broker did under his employment towards procuring a purchaser, and was not rendered incompetent because it incidentally corroborated the testimony of the broker as to the date of the interview between him and the defendant. *Carroll v. Pettit*, 22 N. Y. S. 250, 67 Hun, 418; *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134.

Sec. 737a. Evidence admissible showing communication to another agent of plaintiff's employment by the seller.

In an action for commissions claimed to have been earned by purchasing land for defendant, where defendant claimed that plaintiff received a commission from the seller of the tract in violation of his relations as agent, which commission plaintiff claimed was received for defendant's benefit and by his authority, evidence was admissible of the employment and the extent of the authority of another employed by defendant to assist the plaintiff in securing the option, who, by plaintiff's direction, communicated to defendant the proposed terms for the purchase of the tract in question, but the compensation he was to receive from defendant was immaterial. *Mahon v. Rankin* (Ore. Sup. '09.), 102 P. 608.

Sec. 738. Correspondence to establish agency.

On the issue as to whether a loan broker was the agent of defendant in negotiating a loan for him, or the agent of the plaintiff company which made the loan, correspondence between the broker and the plaintiff's manager relative to defendant's loan and a requested extension thereof, and concerning other loans made by plaintiff through the broker, is admissible in evidence, and the question is for the jury. *Jesson v. Texas Land & Loan Co.*, 3 Tex. Civ. App. 25, 21 S. W. 624; *Wefel v. Stillman* (151 Ala. 249), 44 S. 203; *Wallick v. Lynch* (Iowa, '06), 106 N. W. 617; *Veale v. Greene*, 105 Mo. App. 182, 79 S. W. 731.

Sec. 739. Evidence to show plaintiff's employment by defendant's agent.

In an action for services rendered by plaintiff in purchasing property for defendant, testimony that defendant's agent solicited witness to go to plaintiff and induced plaintiff to negotiate

for the purchase of the property, and that witness accordingly went to plaintiff and represented to him that defendant's agent was authorized to employ him on defendant's behalf. was admissible to show plaintiff's employment by defendant's agent. *St. L. S. W. R. Co. of Texas v. Irvine* (Tex. Civ. App. '05), 89 S. W. 428

Sec. 740. Any competent evidence to prove or to disprove plaintiff's employment.

Where defendant denies that he agreed to pay plaintiff a commission for selling his property at a certain price as claimed by plaintiff, evidence of one to whom defendant had given an option prior to the alleged agreement that he was able and willing to pay said price without any deductions therefrom, was competent to disprove the contract. *Dexter v. Collins*, 21 Colo. 455, 42 P. 664; *Border v. Isherwood*, 120 Iowa, 677, 94 N. W. 1128; *McDermott v. Mahoney*, 119 Iowa, 470, 115 N. W. 32, 130 Iowa, 200; *Lewis v. Susmilch*, 130 Iowa, 203, 106 N. W. 624; *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665; *Childs v. Ptomey*, 17 Mont. 502, 43 P. 714; *Jackson v. Higgins*, 70 N. H. 637, 49 A. 574; *Miller v. Irish*, 3 Hun (N. Y.), 352, 67 Barb. 256, 5 Thomps. & C. 707, affirmed 63 N. Y. 652; *Hodgkins v. Mead*, 8 N. Y. S. 854; *Dayton v. Rycerson*, 13 How. Pr. (N. Y.) 281; *Bertelson v. Hoffman*, 35 Wash. 459, 77 P. 801; *Going v. Cook*, 1 Wash. 224, 23 P. 412; *Indiana Fruit Co. v. Sandlin*, 125 Ga. 222, 54 S. E. 65; *Harvey v. Lindsay*, 117 Mich. 267, 75 N. W. 627.

Sec. 740a. Evidence admissible to show transaction occurred within the period alleged by plaintiff.

In an action for commissions for a sale of land, it was not error to admit evidence as to the authorization that it dated prior to December 8, 1905, where the amended complaint sets out that in June, 1904, plaintiff was employed by defendants to procure purchasers for the land, and that such work was continued until April, 1906, when the lands were sold, for the evidence objected to goes to prove the transaction between June, 1904, and December 8, 1905. *Ross v. Carr* (N. M. Sup. '09.), 103 P. 307.

Sec. 740b. Real contract admissible to show difference from that sued on.

The real contract is admissible in evidence to show difference from that sued on. *Tracey Land Co. v. Land etc. Co.*, 131 Iowa 40, 107 N. W. 1029.

Sec. 741. Evidence to prove defendant's agent had authority to employ a broker.

Where plaintiff claims to have been employed as broker by the husband as agent of defendant, any competent evidence is admissible which tends to show that the husband had authority to employ a broker on behalf of his wife. *Eichberg v. Ware*, 92 Ga. 508, 17 S. E. 770; *Hall v. Grace*, 179 Mass. 400, 60 N. E. 932; *Darling v. Howe*, 14 N. Y. S. 561, 60 Hun, 578.

Sec. 742. Evidence as to the value of property, on issue as to good faith of broker in accepting employment.

In an action against their principal for damages for the loss of commissions caused by the refusal to accept the deed and carry out the contract where the defense was want of mental capacity to contract, evidence of the actual value of the property is competent only when offered to show that the price offered was so exorbitant as to be inconsistent with good faith on the part of the broker in undertaking to contract for the purchase at the price authorized. *Cavender v. Waddingham*, 5 Mo. App. 457.

Sec. 743. Evidence to prove or to disprove plaintiff the procuring cause of the transaction.

In an action by a broker for compensation, the defense being a general denial, any competent evidence is admissible in behalf of plaintiff or defendant which tends to prove or to disprove that plaintiff was the procuring cause of the transaction into which the defendant and the customer entered; if any act of the broker in pursuance of his authority to find a purchaser is the initiatory step that leads to the sale consummated, the owner must pay the commission. *Hoadley v. Danbury Sav. Bk.*, 71 Conn. 599, 42 A. 667, 44 L. R. A. 321; *Doonan v. Ives*, 73 Ga. 295; *Smiley v. Bradley*, 18 Colo. App. 191, 70 P. 696; *Adams v. Mc-*

Laughlin, 159 Ind. 23, 64 N. E. 462; *Hunn v. Ashton*, 121 Iowa, 265, 96 N. W. 745; *Sawyer v. Bowman*, 91 Iowa, 717, 59 N. W. 27; *Newton v. Ritchie*, 75 Iowa, 91, 39 N. W. 209; *Creager v. Johnson*, 114 Iowa, 249, 86 N. W. 275; *Brooks v. Leathers*, 112 Mich. 463, 70 N. W. 1099; *Kerr v. Cusenbury*, 69 Mo. App. 221; *Willard v. Wright* (Mass. Sup. '09), 89 N. E. 559; *Childs v. Ptomey*, 17 Mont. 502, 43 P. 714; *Waters v. Rafalsky*, 119 N. Y. S. 271; *Lockhart v. Hamlin*, 190 N. Y. 132, 82 N. E. 1094; *Doran v. Bussard*, 45 N. Y. S. 387, 18 App. Div. 36; *Goldsmith v. Cook*, 14 N. Y. S. 878, Rev. 13 N. Y. S. 578; *Bowser v. Field* (Tex. Civ. App. '91), 17 S. W. 45; *Larsen v. Thoma* (Iowa Sup. '09), 121 N. W. 1059.

Sec. 743a. Proper to show purchaser's state of mind regarding the purchase.

In determining the question which one of two brokers effected a sale, it is proper to show by the purchaser his state of mind regarding the purchase after he had left the broker claiming the commission. *McGuire v. Carlson*, 61 Ill. App. 295.

Sec. 744. Evidence to prove or to disprove customer's ability, readiness and willingness to buy.

Where the owner of land refused to complete a sale to a purchaser introduced by a broker, evidence of the prospective purchaser in an action by the broker for commissions that at the time he was introduced to the land owner he was ready and willing to buy the land on the terms mentioned in the contract, and so stated to the owner, was admissible. *McDermott v. Mahoney*, 119 Iowa 470, affirmed 115 N. W. 32, 139 Iowa 292; *Walsh v. Gay*, 63 N. Y. S. 543; 49 App. Div. 50; *Kirchner v. Reichardt*, 27 Misc. 530, 58 N. Y. S. 314; *Joffe v. Nagel*, 114 N. Y. S. 905.

Sec. 745. If the contract omits compensation evidence of the reasonable value of broker's services.

In an action for services rendered by real estate brokers in procuring a purchaser for defendant's land, where there were no written pleadings in the trial court and no testimony of any definite contract, evidence of the value of the service based on the price for which the land sold was properly admitted and

a judgment entered upon that basis was proper. *Brand v. Merritt*, 15 Colo. 236, 25 P. 175; *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175; *Bickart v. Hoffman*, 19 N. Y. S. 472; *Carruthers v. Towne*, 86 Iowa 318, 53 N. W. 240; *Knight v. Knight*, 142 Ill. App. 62; *Weil v. Schwartz* (Tex. Civ. App. '09), 120 S. W. 1039; *Fleming v. Wells*, (Colo. Sup. '09), 101 P. 66.

Sec. 746. Evidence to prove or to disprove existence of custom.

Where a principal claimed that its broker had been notified of its custom to give only quit-claim deeds to purchasers of its real estate, evidence to show that after its refusal to give a deed with warranty, it offered to give such a deed if an increased price was paid, was admissible to show that no such custom existed. *Beach v. Traveler's Ins. Co.*, 73 Conn. 118, 46 A. 867.

Sec. 747. Evidence of option holder to disprove agency.

Where defendant denied that he agreed to pay plaintiff a commission for selling his property at a certain price, as claimed by plaintiff, evidence of one to whom defendant had given an option price to the alleged agreement, that he was able and willing to pay such price, without any deduction therefrom, was competent to disprove the agency. *Dexter v. Collins*, 21 Colo. 455, 42 P. 664.

Sec. 748. Entry in book of price agreed on, made in defendant's presence.

In an action by real estate brokers for commissions on a sale, where the question in dispute is whether plaintiffs had authority to sell at the price named, an entry in plaintiff's books of the price agreed on, made by them in defendant's presence and at the time of their conversation with him, is admissible in evidence, though written in cipher. *Monroe v. Snow*, 131 Ill. 126, 23 N. W. 401.

Sec. 749. Oral evidence to show that written agreement was obtained by fraud.

The rule of law forbidding the admission of evidence of an oral agreement made prior to or contemporaneously with the

written agreement in question, does not preclude the admission of evidence tending to show that the written agreement was fraudulently obtained, or that it resulted from accident or mutual mistake. *Culp v. Powell*, 68 Mo. App. 238

Sec. 749a. Parol evidence admissible to rebut that of plaintiff.

In an action for a real estate broker's commissions, parol evidence that the written agreement of prospective purchasers with the owner was not finally binding, and that after it was revoked, plaintiff sought to procure new purchasers, is admissible on behalf of such owner to rebut the effect of such agreement in evidence. *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994.

Sec. 750. Evidence of length of time land for sale by broker, to show knowledge by purchaser.

In an action for commissions for procuring a purchaser for land where the land was purchased by one claiming to buy on his own initiative, evidence that the land had been listed two months before the transaction in issue, and the purchaser informed of the land being for sale from that source, was admissible as tending to explain how the purchaser ascertained that the land was for sale and came to negotiate with defendant for its purchase. *Ryan v. Page*, 134 Iowa 60, 111 N. W. 405.

Sec. 751. Contract between plaintiff and third person to show he desired to purchase.

In an action to recover commissions for a sale of defendant's land, a contract entered into between plaintiff and a third person setting forth the terms of the purchase, was admissible to show that such third person was willing to purchase the property, though plaintiff had no authority to enter into a contract which was binding on defendant. *Kepner v. Ford* (N. Dak. '07), 111 N. W. 619; *Clark v. Wilson*, 41 Tex. Civ. App. 450, 91 S. W. 627.

Sec. 752. Evidence concerning purchaser's securing funds to buy, on issue as to ability.

In an action for a broker's commissions, evidence concerning arrangements made by the purchaser's broker for funds

with which to complete the purchase, and the financial ability of the concern from which the funds were to be secured, was admissible. *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

Sec. 752a. Evidence admissible on issue whether broker was a joint purchaser.

In a broker's action for commissions, evidence that to enable the purchasers to make the cash payment required plaintiff agreed to loan them the amount of the commissions claimed by him, was admissible on the issue whether plaintiff was a joint purchaser. *Smith v. Fears* (Tex. C. A. '09), 122 S. W. 433.

Sec. 753. As to what occurred between plaintiff and another as to drawing deed to purchaser.

In an action for a broker's commissions, evidence as to what occurred between plaintiff and another with reference to drawing the deed to the purchaser plaintiff claimed to have secured was admissible. *Leuschner v. Patrick* (Tex. Civ. App.), 103 S. W. 664.

Sec. 754. Evidence of value of lands as bearing on value of plaintiff's services.

Where plaintiff sued on a *quantum meruit* for services in obtaining options to purchase coal lands for defendant, evidence as to the value of the lands was admissible as bearing on the value of plaintiff's services. *Denk Bros., C. & C. Co. v. Stroetter*, 229 Ill. 134, 82 N. E. 250; *Huff v. Hardwick*, 19 Colo. App. 416, 75 P. 593.

Sec. 755. Declarations of defendant's agents as part of the *res gestae*.

In an action for a broker's commissions, declarations of defendant's agents as to the broker's commissions, made at the time they were negotiating and closing the deal with the purchaser found by the broker, are admissible as part of the *res gestae*. *Fritz v. Chicago Grain & Ele. Co.*, 136 Iowa, 699, 114 N. W. 193. *Tuffree v. Binford*, 130 Iowa, 532, 107 N. W. 425; *Joffe v. Nagel*, 114 N. Y. S. 905; Mechem on Ag. Sec. 715.

Sec. 756. Where terms of sale were not given, evidence of purchaser's refusal to accept.

Where, in an action by a real estate broker for commissions for procuring a purchaser of real estate, it appears that the terms of sale were not given by defendant at the time the broker was employed, evidence of occurrences at the meeting of the parties resulting in the purchaser's refusing to accept the contract proposed was admissible, whether defendant had an option on the property or had merely authority to sell it. *Behrman v. Marcus*, 107 N. Y. S. 12. Also where terms were not expressed in written agreement, parol evidence to establish same. *Casey v. Richards* (Cal. App. '09), 101 P. 36.

Sec. 757. Evidence as to custom of agents to look after vacant property.

The testimony of real estate agents in St. Louis that it is a custom or usage of real estate agents having in charge property for the collection of rents to look after the property while vacant, is admissible to explain the intended scope of the agency. *Cameron v. McNair*, 76 Mo. App. 366.

Sec. 758. Deed and receipt as tending to show defendant could have obtained the property.

In an action for a broker's commissions for negotiating a purchase which defendant refused to consummate, a deed and receipt purporting to have been signed and acknowledged by the owner, and proof of a tender, were admissible, with other proof, as tending to show that defendant could have obtained the property at his offer had he desired to do so, where no objection was raised as to their form or genuineness. *Hanna v. Espalla*, 148 Ala. 313, 42 S. 443.

Sec. 758a. Evidence admissible to show defendant refused to execute deeds to buyers procured by broker.

Evidence that the agents of the owner of lands, with the approval of the owner, sold a part of them which had been intrusted to plaintiffs for sale, to persons who were found by plaintiffs, and induced by them to come on the lands with the purpose of purchasing, is admissible in an action against the owner for a breach of his contract in refusing to execute deeds

to buyers found by plaintiffs. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775.

Sec. 759. Evidence of person who purchased claim that defendant had no part in the transaction.

In an action for commissions by a person engaged to secure title to certain mining properties, where defendant's answer averred that he had taken no part in the transaction involving their subsequent purchase by another person, and plaintiff had testified that he would not be entitled to commissions had the person obtaining the purchase dealt with persons other than defendant, evidence of the person who purchased the claims that defendant had no part in the transaction, was admissible. *Bailey v. Carlton*, 43 Colo. 4, 95 P. 542.

Sec. 760. Evidence tending to show defendants held themselves out as partners.

In an action by a real estate broker for commissions, wherein one defendant filed a separate plea denying that he was justly liable with his co-defendant, evidence was admissible by the broker as to various trips made by him with his co-defendant around the country for the purpose of selling lands, and the action of the defendant denying joint liability therewith, as was also evidence by another of a purchase by him of land from defendants jointly, as tending to show the relation of defendants and that they held themselves out as partners. *McCann v. Meyer*, 232 Ill. 507, 83 N. E. 1042.

Sec. 761. Prices at which similar lands were selling as evidence of good faith.

In an action by a real estate agent for commissions, evidence of the prices at which neighboring lands of the same kind were selling at the time the sale was made is admissible to show that a good price was realized, thereby tending to prove faithfulness and efficient service. *Anderson v. Lewis* 64 W. Va. 297, 61 S. E. 160.

Sec. 761a. Competent to show intentions of parties by subsequent dealings.

In an action by an agent against the principal for a commission on a real estate deal, it is competent to show the real

intentions of the parties as to carrying out the contract by their subsequent dealings in pursuance thereof. *Gibson v. Hunt* (Iowa Sup. '03), 94 N. W. 277.

Sec. 761b. Evidence admissible on question whether broker had abandoned the contract.

Where, in an action by plaintiff for commissions on a sale of defendant's property, defendant alleged an abandonment of the contract, statements of plaintiff that he continued his efforts to dispose of the property were competent on the question of whether he had abandoned the contract. *Clements v. Stapleton*, 136 Iowa, 137, 113 N. W. 546.

Sec. 761c. Broker's contract admissible in evidence.

Where the assignee of certain real estate brokers sued in *assumpsit* to recover compensation for a broker's services rendered under a written contract with defendant, which defendant had cancelled before the termination of the contract term, the contract was admissible in evidence. *Breen v. Roy* (Cal. App. '08), 97 P. 170.

CHAPTER X.

EVIDENCE—INADMISSIBLE.

Sec. 762. On bill for specific performance, that land in one year doubled in value.

On a bill for specific performance of a contract to convey, in which the defense is, that the broker who made the sale did so without authority of defendant, evidence that the land in one year doubled in value is inadmissible. *Wilkinson v. Churchill*, 114 Mass. 184; *Goin v. Hess*, 102 Iowa, 140 71 N. W. 218.

Sec. 763. Agent's private record book to prove authority to sell land.

The private record book of a real estate agent is not competent to prove, in an action for commissions, that authority had been given to him by the owner of the land to sell the same. *Boyd v. Jennings*, 46 Ill. App. 290. Compare *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401.

Sec. 764. Evidence to prove custom among brokers in exchanges to charge each party.

An offer to prove a general custom among brokers acting for both parties to an exchange of lands to charge commissions to each, held properly refused, for the reason that it appeared that the broker was the agent of one of the parties, and could not, therefore, legally demand compensation from the other. *Dartt v. Somnesym*, 86 Minn. 55, 90 N. W. 115.

Sec. 765. Evidence of an offer of compromise.

Evidence that the owner refused to pay the broker, but offered as a compromise, to pay a fixed amount and to give another specified amount to a church, is inadmissible, under the

rule that propositions made with a view to a compromise are not proper evidence. *Emery v. Atlanta R. E. Ex.*, 88 Ga. 321, 14 S. E. 556; *Ross v. Decker*, 68 N. Y. S. 790, 34 Misc. 168.

Sec. 766. Evidence by unexpert witnesses as to the value of a broker's services.

It was not error to refuse to admit the opinions of witnesses as to the value of plaintiff's services in negotiating a purchase, the witnesses not being experts and having no better means of forming a judgment than the jurors. *Miller v. Early*, 22 Ky. L. R. 825, 58 S. W. 789.

Sec. 767. In an action for executed sale evidence of responsibility of purchaser.

In an action by a broker against a vendor for his commissions, the contract between the vendor and purchaser being executed, and there being no allegation or proof that the broker induced the vendor to execute the contract, or any representation of bad faith, testimony as to the financial ability of the purchaser was inadmissible. *Fleet v. Barker*, 104 N. Y. S. 940, 120 App. Div. 455. Compare *Dodson v. Milliken*, 27 App. (D. C.) 500.

Sec. 768. Evidence that defendant wanted witness to advise him as to purchaser's proposal.

In an action for a broker's commissions, evidence that defendant applied to witness to know what to do concerning the proposed purchaser's proposition to pay for the land in monthly installments, and the witness's advice given in response, was inadmissible. *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

Sec. 769. Oral evidence to extend expired written authority to agent.

Written authority was entered into giving a broker the exclusive right to sell real estate at a fixed price before a certain date. *Held*, that an offer to show that at the time of the execution of the contract defendant told plaintiff that if the said sale was effected after the expiration of the written contract

defendant would pay the broker his commission, was inadmissible. *Lazley v. Studebaker*, 75 N. J. L. 599, 68 A. 98.

Sec. 769a. Written contract insufficient and parol evidence inadmissible.

Under Ballinger's Annotated Code and Statutes, Sec. 4576, amended by laws of 1905, p. 110, c. 58, requiring contracts for the employment of brokers to sell real estate for a commission to be in writing, a written contract employing a broker to procure a purchaser of real estate for a fixed price net, containing no stipulation for the payment of a commission, and showing the erasure in the printed form used of the words providing for the payment of a commission, is insufficient, and parol evidence fixing the liability for the commissions is inadmissible. *Footte v. Robbins*, 50 Wash. 277, 97 P. 103.

Sec. 770. In an action by architect for fees, cost of building given building department.

In an action by an architect for fees for making plans for a building at a specified per cent. of its cost, a statement as to the cost in the plans filed with the building department, was inadmissible. *Israels v. McDonald* 107 N. Y. S. 826 123 App. Div. 63.

Sec. 771. In an action for commissions evidence of defendant's dealings with other brokers.

In an action by a broker for compensation on the issue as to whether the contract with the principal called for a commission of a certain percentage of the proceeds of the sale, or of the proceeds over a specified price, evidence as to defendant's dealings with other real estate agents, and the terms under which he had listed the land with them, was inadmissible. *Lloyd v. Kerley* (Tex. Civ. App. '07), 106 S. W. 696; *Ross v. Carr* (N. M. Sup. '09), 103 P. 307; *Leander v. Graves* (Colo. Sup. '09), 100 P. 403.

Sec. 771a. Evidence as to property not involved in suit inadmissible.

Under a declaration claiming commissions only on property purchased by defendant, evidence of negotiations by plaintiffs

in regard to other property is inadmissible. *Martien v. Mayor, etc., Baltimore*, 109 Md. 260, 71 A. 966.

Sec. 772. Receipt in connection with another exchange of the same property.

In an action by real estate brokers for a commission for negotiating an exchange of defendant's property, which defendant refused to carry out, a receipt given by one of the plaintiffs to defendant for a commission paid him by defendant for effecting an exchange of the same property with another purchaser is inadmissible, because foreign to the issues. *Goodman v. Linetzky*, 107 N. Y. S. 50.

Sec. 773. Printed statutes of New Jersey, under plea of non-assumpsit.

Where a resident of New Jersey sues to recover on a parol contract for commissions for a sale of real estate in New Jersey, the printed statutes of New Jersey requiring such contracts to be in writing was inadmissible under the plea of non-assumpsit, but only by way of special matter, after due notice. *Calloway v. Prettyman*, 218 Pa. 293, 67 A. 418.

Sec. 774. In action against husband for commissions, what was said between wife and purchaser.

In an action against a husband for a broker's commissions for selling the wife's land, testimony that another told defendant that plaintiff tried to sell him the property at a profit above the figure the wife asked, and as to what was said between the wife and one of the purchasers, was inadmissible. *Green v. Brady*, 152 Ala. 507, 44 S. 408.

Sec. 775. Declarations and statements by plaintiffs as to sale of land, as self-serving.

In an action for a broker's commissions, declarations and statements by the plaintiff as to the sale of the land, and what he would be entitled to, were self-serving and inadmissible. *Leutscher v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664; *Ross v. Muskowitz*, 100 Tex. 434, 100 S. W. 768. Also by

the owner as to the sale of the property. *Goldstein v. D'Arcy*, 201 Mass. 312, 87 N. E. 584.

Sec. 776. On issue whether defendant's agent had authority—Defendant's opinion.

Where the issue was whether the defendant's agent had authority to make a certain contract, defendant's opinion to that effect was inadmissible, as being a conclusion of law. *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946.

Sec. 776a. Statement by owner in regard to title the mere expression of an opinion.

That a land broker was told by the owner that defects had been found in the title, but that he believed it was good, as they had owned the land thirty or forty years, was sufficient to put the broker on inquiry and charge him with notice of the defects; the statement by the owner that the title was good being merely an expression of opinion. *Montgomery v. Amsler* (Tex. Civ. App. '09), 122 S. W. 307.

Sec. 776b. Admission of contract in evidence held prejudicial to plaintiff.

Where, in an action for broker's commissions for procuring a purchaser of real estate, the issue was whether plaintiff had been employed to procure a purchaser, the admission in evidence of a contract of sale drawn in the absence of plaintiff, stating that the seller and purchaser agreed that no broker had brought about the sale, and that no commission was to be paid to the broker, was prejudicial to plaintiff. *Koch v. Bjorkegran*, 119 N. Y. S. 193.

Sec. 777. In interpleader, declaration of principal that one was entitled to the fee.

In an action in interpleader where the issue between the parties is as to the right to commissions for the sale of real estate, the declarations of the owner of the property sold, made some time after the sale had been effected and in the absence of the defendant, to the effect that he thought plaintiff was

entitled to the commission, are inadmissible. *Shipman v. Frech*, 3 N. Y. S. 932, 15 Daly, 151.

Sec. 778. Statement by principal that absent broker had no authority to sell.

In an action by a broker for commissions on a sale of land, where another broker claiming the same commissions is substituted as defendant for the principal, he having paid the commissions into court, the principal's statement to one of the brokers, in the other's absence, that the absent broker had no authority to sell the land with a builder's loan, is properly excluded. *Id.*

Sec. 779. Under general denial, that defendant sold premises before sale by plaintiff.

Where the answer is a general denial, the issue presented by the pleading is the truth of the allegations of the petition. Under such an issue affirmative proof in favor of the defendant can not be received, and an instruction submitting such proof to the jury is erroneous, and hence, evidence offered by defendant that he sold the premises to other parties before the sale by plaintiff is inadmissible. *Griffith v. Woolworth*, 44 N. W. 1137, 28 Neb. 715.

Sec. 780. Unless pleaded, evidence that defendant defeated payment.

In an action by a broker to recover commissions for selling land, evidence that the act of defendant prevented the happening of the contingency on which payment was to be made was inadmissible, the excuse not being pleaded by the plaintiff. *Turner v. Lane*, 93 N. Y. S. 1083, 47 Misc. 387.

Sec. 781. Evidence that defendant's agent refused hotel to prospective purchasers.

In an action by a broker for commissions alleged to have been lost by the refusal of his client to convey the land sold, evidence that the client's agent had refused the use of the client's shed and hotel at the place where the land is situated

to prospective purchasers found by plaintiff was inadmissible. *Burnet v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775.

Sec. 782. Evidence as to value of services where contract fixed commission.

Where, in an action for a broker's commissions for negotiating a purchase, it appeared that if he had been employed, he was entitled to a fixed commission under the contract, evidence was inadmissible to show what was a reasonable commission for the services. *Hanna v. Espalla*, 148 Ala. 313, 42 S. 443; *McDermott v. Abney*, 106 Iowa, 749, 77 N. W. 505; *Beatty v. Russell*, 41 Neb. 321, 59 N. W. 919; *Evans v. Gay*, 38 Tex. Civ. App. 442, 74 S. W. 575; *Fortran v. Stowers*, 113 S. W. 631 (Tex. Civ. App. '08); *Goldstein v. D'Arcy*, 87 N. E. 584, 201 Mass. 312.

Sec. 783. Evidence of option after sale had been completed.

In an action by a broker for commissions, evidence of independent negotiations regarding an option after a sale had been completed by plaintiff is inadmissible, though it might have been competent if relating to negotiations before the sale was made. *Reed v. Light*, 170 Ind. 550, 85 N. E. 9; *Geo. B. Loving Co. v. Hesperian Cattle Co.*, 176 Mo. 330, 75 S. W. 1095.

Sec. 783a. Evidence held inadmissible.

Where a contract between an owner of land and his agent for sale contained specific authority to the agent to sell a certain acreage, evidence was inadmissible, in an action by the agent for commissions, to show that the tract contained a greater acreage than stated, to defeat the claim, where there was no proof that the defendant asserted any claim to a greater acreage prior to the time plaintiff made the sale. *Denton v. Howell* (Tex. Civ. App. '05), 87 S. W. 221.

Sec. 783b. When evidence of improvements inadmissible.

Evidence of improvements made by a land owner, without the knowledge of his broker, can not be shown in an action by the broker for commissions for procuring a purchaser for the land at the price fixed before the making of the improve-

ments, as tending to show that the price so fixed must have been changed. *Hawley v. Maddocks*, 25 Wash. 297, 65 P. 544.

Sec. 783c. Testimony of greater acreage inadmissible to defeat broker's right to commissions.

Where a contract specifically authorizes the sale of a tract of land containing a certain number of acres, and it does not appear that prior to the sale the owner claimed, or that the agent knew, that there was a greater number of acres in the tract, evidence that the tract did contain a greater number of acres is inadmissible to defeat an action for commissions. *Howell v. Denton* (Tex. Civ. App. '08), 113 S. W. 314.

CHAPTER XI.

EVIDENCE—IMMATERIAL AND IRRELEVANT.

Sec. 784. Fact that defendant had other agents not instrumental in effecting sale.

In an action for commissions for procuring a purchaser for land, the fact that defendant had other agents is immaterial, it not being contended that they had been instrumental in bringing about the sale. *Rounds v. Alee*, 116 Iowa, 345, 89 N. W. 1098; *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218.

Sec. 785. In an action for commissions, right of vendor to convey or value of property.

Where a broker employed to purchase specific property at a fixed price had brought suit against his principal for commissions, and the latter refused to accept the deed, the vendor's right to convey, or the actual value of the property, were held not to be essential matters of inquiry, where the broker had acted in good faith. *Wheeler v. Knaggs*, 8 Ohio, 169.

Sec. 786. In action for commissions, that broker exceeded authority by making a contract of sale.

Where defendant employed real estate brokers to find a purchaser for lands, the fact that they exceeded their authority by making a contract of sale is not material in an action to recover their commissions. *Fiske v. Soule*, 87 Cal. 313, 25 P. 430.

Sec. 787. In action against agent for fraud, whether pretended borrower shared the money.

A recovery in an action by the principal against the broker for fraudulent representations that the worthless property on

which the loan was made was good security, is not affected by the question whether he shared the money with or delivered any part of it to the pretended borrower. *Rubens v. Mead*, 121 Cal. 17, 53 P. 432.

Sec. 788. Whether the contract was signed before or after contract for exchange was signed.

In an action by a broker to recover commissions on an exchange of property effected by him, whether the written agreement by the plaintiff to wait for his commissions until title closed was signed before or after the signing of the contract of exchange was immaterial, where all the terms of the written contract of exchange were fully agreed on on the preceding day, the subsequent agreement to wait for the accrued commissions being unsupported by a consideration. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546. See also Sec. 19.

Sec. 789. Where broker finds purchaser, the reasonableness of the time.

Where the broker finds a purchaser at the seller's terms, while still employed, the reasonableness of the time which he has taken to do so is immaterial. *Moore v. Boehm*, 91 N. Y. S. 125, 45 Misc. 622.

Sec. 790. In an action for selling a title bond, attempt by seller to show broker part owner of premises.

A bond was given by A. to convey a lot of land at a price named per square foot, the bond was assigned to B., who employed C. to find a purchaser for the land, agreeing to pay him all he could get over the price named in the bond; C. sold the land at a higher price to D., and A., at the request of B., conveyed the land; in a suit brought by C. against B. to recover the excess over the price named in the bond, B. offered to show that C., at the time of his employment as agent was interested in the land as owner or part owner, and did not disclose this fact to him, and contended that the sale of the land was a fraud upon him. *Held*, that the question of such ownership was immaterial. *Durgin v. Somers*, 117 Mass. 55.

Sec. 791. On agreement to share commissions evidence that plaintiff tried to sell.

Where plaintiff authorized defendant to sell property for which plaintiff was agent, the profits to be divided equally between them, but did not transfer the exclusive agency to defendant, an attempt on plaintiff's part to effect a sale to defendant's customer was not inconsistent with his contract with defendant, and evidence thereof was immaterial in an action by the plaintiff to recover his share of the profits on a sale made by defendant. *Madler v. Pozorski*, 124 Wis. 477, 102 N. W. 892.

Sec. 791a. Evidence as to how long agent had known property prior to sale was immaterial.

Where, in an action by a broker for commissions for procuring a purchaser, it was not claimed that an agent of the purchaser learned that the property was for sale until after the broker had visited the purchaser, evidence as to how long the agent had known the property prior to the time of sale was immaterial. *Benedict v. Dakin* (Ill. Sup. '09), 90 N. E. 712.

Sec. 792. That broker failed to impart the name of the purchaser.

Where, in an action on a contract for a division of a broker's profits, there was evidence that defendant sold the property to a purchaser procured by plaintiff, in accordance with the contract between them for a division of commissions, and that, at the time of the sale defendant knew that plaintiff had procured a purchaser, it was immaterial that plaintiff failed to impart to defendant, prior to the sale, the name of the person with whom plaintiff had been negotiating, and to whom the property was subsequently sold. *McCleary v. Willis*, 35 Wash. 676, 77 P. 1073. See also Secs. 487, 525.

Sec. 793. Where contract must be in writing, to allege defendant received benefits.

Where the petition, in an action by a real estate agent to recover commissions, fails to show a written contract, as re-

quired by statute, the fact that the plaintiff alleges that defendant received the benefit of his services, and therefore can not be relieved of his liability to pay for the same is immaterial. *Covey v. Henry*, 71 Neb. 118, 98 N. W. 434.

Sec. 794. In an action for commissions for purchasing, amount paid broker by vendor.

In an action by a broker for commissions in purchasing lands for defendants, defendants having introduced the vendor as a witness, and he having testified that he paid commissions to such broker for effecting the sale, it was not error to exclude evidence of the amount paid by him, it being immaterial. *Lindt v. Schlitz Brewing Co.*, 113 Iowa, 200, 84 N. W. 1059.

Sec. 795. Where averred that trade was made by D., whether he received compensation.

Where plaintiffs claim they effected an exchange of defendant's property, and defendants assert that the trade was brought about by D., the question whether D. had received compensation for his services was properly excluded as immaterial. *Creager v. Johnson*, 114 Iowa, 249, 86 N. W. 275; *Sewell v. Collison*, 108 N. Y. S. 25, 123 App. Div. 586

Sec. 796. In an action for the value of personalty for effecting an exchange of land, value of the latter.

In an action for the value of personalty, which plaintiff was to receive for effecting an exchange of land of defendant for a store property, and which plaintiff had not received because defendant refused to complete the trade, evidence as to the value of the land was properly excluded as immaterial. *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151.

Sec. 797. Where owner ratified sale by attorney, whether he knew all the terms.

Where one authorizes an attorney in fact, by power duly signed and acknowledged, to make a certain contract for the purchase of land with certain parties and of a certain date, and subsequently ratifies the action of his attorney, it is immaterial whether he knew all the terms and conditions of the

contract at the time it was made, and he will be bound by the contract made by such attorney. *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666.

Sec. 798. In an action against a broker to account for part of the price, the value of the property.

Where, in an action against a broker for failure to account for a part of the price received by him, the issue was, whether the broker sold the land to the purchaser through a third person, as his agent, or whether he sold it to a third person who resold it to the purchaser, evidence of the value of the property at the time of the sale was immaterial. *Buchanan v. Randall* (S. D. Sup. '06), 109 N. W. 513.

Sec. 799. Where an owner sold to a customer, broker could recover although he failed to notify the owner.

Where an owner of standing timber, after employing plaintiff to sell the same, sold it himself to a purchaser procured by plaintiff, it was immaterial to plaintiff's right to recover for the services, that the owner was not guilty of fraud in relation to such sale, or that he should have had previous knowledge that the purchaser had been induced to buy through plaintiff's efforts. *McDonald v. Cabiness*, 100 Texas, 615, 98 S. W. 943, affirmed 102 S. W. 721. Compare *Nance v. Smyth*, 118 Tenn. 349, 99 S. W. 698; *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65; *McLaughlin v. Campbell* (N. J. Err. & App. '09), 74 A. 530.

Sec. 799a. In order to be entitled to recover commissions it was immaterial whether the broker was the agent.

Where the owners expressly agreed that the broker should have a commission in case of a sale to his customer, it is immaterial, as regards his right to commissions, that he was not their agent. *Lawler v. Armstrong* (Wash. Sup. '09), 102 P. 775.

Sec. 799b. Brokers negotiating an exchange not bound to inform one of the parties of his employment by the other.

Brokers negotiating an exchange of properties being middlemen held not bound to inform one of the parties of their em-

ployment by the other. *Marks v. O'Donnell*, 121 N. Y. S. 214. See Sec. 578.

Sec. 800. Where the evidence is silent as to the broker making previous sales, whether he had a license.

Where the evidence is silent as to whether a broker was engaged in the real estate business, or had made previous sales, it is immaterial whether or not he had a license at the time of the sale in question. *Packer v. Sheppard*, 127 Ill. App. 598. See also Sec. 576.

Sec. 801. In an action by a broker for fee for purchasing, right of vendor to convey and value of the land.

Where a broker employed to purchase specific property at a fixed price brought suit against his principal for commissions, on the latter refusing to accept a deed therefor the vendor's right to convey, or the actual value of the property, were held not to be essential matters of inquiry, where the broker had acted in good faith. *Wheeler v. Knaggs*, 8 Ohio, 169.

Sec. 801a. Whether or not the party to be charged with the commission is the owner of the land is immaterial.

The right of a broker to recover a commission for making a sale of land is purely a matter of contract; and where a valid contract in writing has been made, it is immaterial whether or not the party to be charged is the owner of the land. *Sanchez v. Yorba*, 8 Cal. App. 490, 97 P. 205.

Sec. 802. Evidence that after revocation broker produced a responsible purchaser.

Where an agent's authority to sell his principal's land has been revoked, whether the agent afterwards actually secured a purchaser ready and able to buy the land on the principal's terms was immaterial, in an action for damages for the revocation, unless on the issue of damages. *Mulligan v. Owens*, 123 Iowa, 285, 98 N. W. 792.

Sec. 803. Whether the agent was to secure a purchaser or make a sale, where owner would not consummate.

Whether real estate agents were to secure a purchaser or make a sale themselves is immaterial, where the owner, by his

conduct, rendered it impossible for them to consummate the sale. *Church v. Dunham*, 14 Idaho, 776, 96 P. 203, 205.

Sec. 803a. Letter between third parties immaterial.

In an action by a real estate broker to recover commissions for services in effecting an exchange of lands, which was finally completed by other brokers, a letter from one of these other brokers to another of them, offered by the defendant merely as a part of the history of the transactions which culminated in the sale, may be excluded as immaterial as well as being *res inter alios*. *Hall v. Grace*, 179 Mass. 400, 60 N. E. 932.

Sec. 804. Statement by defendant that if he had had his own way he would have sold when he had a chance.

In an action for commissions for procuring a purchaser of land, a conversation between defendant and the broker, several months after the contract was entered into between them, in which defendant stated that if he had had his own way he would have sold his land when he had a chance to, was irrelevant and immaterial. *Ewing v. Lunn* (S. D. Sup. '08), 115 N. W. 527.

Sec. 805. In a suit to recover deposit money, evidence of subsequent contract irrelevant.

An agent sold a tract of land subject to the ratification of his principal, with an agreement that, if not ratified, he would refund to the purchaser the money paid by him; the principal refused to ratify. In a suit brought by the purchaser for the money so paid by him, *Held*, that evidence of a subsequent contract between the parties was irrelevant, unless it was proposed to show that in making such subsequent contract the matter of the money to be refunded under the first contract was in some way adjusted. *Evans v. George*, 80 Ill. 51.

Sec. 805a. Judgment stricken out as irrelevant.

A judgment in favor of the purchaser against the vendor rescinding the contract for fraud, is not *res judicata* as to the vendor's broker, so as to entitle him to plead it in a suit for his commission, and an allegation setting up the judgment

should be stricken out as irrelevant. *Polak v. Rosenzweig Realty Co.*, 116 N. Y. S. 38.

Sec. 806. In action to recover from an agent part of price, influence of defendant over vendor.

In an action by vendees against the agents who made the sale to recover that part of the price retained by them, without plaintiff's knowledge, the issue being whether defendants were the agents of plaintiffs or of the vendor, proof of the value of the property sold is competent to explain the motive of the parties to the contract, and evidence that the action was not begun until after the defendants had dissolved partnership and become their business rival is also competent; but evidence as to the motives of the vendor and defendants' influence over him, is irrelevant. *Duryea v. Vosburgh*. 1 N. Y. S. 833.

Sec. 807. Evidence that defendant had employed another broker who tried to sell.

Defendant's evidence, in an action by a real estate broker for commissions, that defendant had employed another broker who attempted to dispose of the land to a purchaser, and who had obtained his information from plaintiff, is rightly excluded as irrelevant. *Adams v. McLaughlin*, 159 Ind. 23 64 N. E. 462.

Sec. 808. In a suit for share of fees, answer alleging broker worked in opposition.

Plaintiff alleged that he was authorized by the owners to sell land, and that he agreed to divide the commissions with defendant, if the latter would find a purchaser; that defendant recovered of the owners the commissions on a sale of the land, but refused to pay plaintiff his share; defendant alleged that during the negotiations for the sale of the land, plaintiff worked in opposition to defendant, and endeavored to make a sale to other parties, and that plaintiff was thereby estopped from claiming that he was jointly interested with defendant in selling the land. *Held*, that the plea was irrelevant and properly stricken, there being nothing in the case to indi-

cate that plaintiff was not entitled to find a purchaser himself. *Wefel v. Stillman*, 151 Ala. 249, 44 S. 203.

Sec. 809. In an action for fee for clearing title, evidence of commissions for selling property.

In an action by a real estate dealer to recover on an express contract whereby defendant agreed to pay him a certain percentage of the proceeds of sales, in consideration of services to be rendered in clearing the title to and putting property in marketable condition to effect a sale, evidence as to the customary commissions for making sales of property is irrelevant. *Jefferson v. Burham*, 85 Fed. 949, 29 C. C. A. 481.

Sec. 809a. Conversation not in presence of defendant irrelevant.

Plaintiff alleged a verbal contract by which he was to obtain for defendant the title of co-owners of a mining claim for not more than a certain sum, his commission to be the difference between that sum and the price asked. Defendant alleged that unless a certain sale of property which he was negotiating was effected, plaintiff was to have nothing for his services, and that the sale was not effected. *Held*, that evidence of what a witness, who was in no way connected with defendant and was not present at the conversation during which the contract was made, stated to plaintiff about his understanding with defendant before plaintiff went to see defendant, was irrelevant. *Huntoon v. Lloyd*, 8 Mont. 283.

Sec. 809b. Advice of third person to purchaser held to be immaterial on issue of procuring cause of sale.

On the issue whether a broker employed to procure a purchaser was the procuring cause of the sale, evidence that the purchaser sought the counsel of a third person, and resolved not to purchase unless the third person approved thereof, was immaterial. *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509.

CHAPTER XII.

EVIDENCE IN GENERAL.

Sec. 810. Dissuasion—Evidence that failed to prove.

On the issue whether the owner during the continuance of an option given by him to a broker on certain real estate dissuaded a probable customer of the option holder from purchasing from him, evidence that the owner and the customer had several interviews, and after the termination of the option entered into a contract to accept the land, does not prove dissuasion on the part of the owner. *Smith v. Lawrence*, 98 Me. 92, 56 A. 455.

Sec. 811. Whether or not agent was a regular broker does not affect the value of his services.

Whether or not an agent employed to sell a piece of land is a regular broker, does not affect the competency of evidence as to the price which would be paid a broker for such services, and offered for the purpose of showing what the agent's services were worth. *Hollis v. Weston*, 156 Mass. 357, 31 N. E. 483.

Sec. 812. In an action for procuring lessee, defendant might show that lease was never made.

Plaintiffs, real estate agents, were to receive certain commissions for services in securing a lessee for defendant upon agreed terms, and they procured an informal agreement for a lease to be signed by defendant and the applicant for the lease. *Held*, that defendant might show by parol that the contract was merely provisional, and did not express all the terms of the lease to be entered into by the parties, as was also understood by plaintiffs, and that the lease was never consummated, as no final agreement was ever made between defend-

ant and the lessee. *Buxton v. Beal*, 49 Minn. 230, 51 N. W. 918. See also Sec. 427.

Sec. 813. Real estate man long a resident of the town competent to testify as to the value of property.

A real estate man who has long resided in a certain town and has property listed on his books in a certain addition, is competent to testify as to the value of property in that addition. *Ryan v. K. C., etc., R. Co.*, 111 Mo. 456, 20 S. W. 234.

Sec. 814. Evidence properly excluded that broker, three years after the sale, became partner of purchaser.

In an action brought by B., an agent, to recover compensation from R. for services in selling real estate of the latter, the defendant pleaded the general issue, and that at the time of the sale B. was interested as a partner of the purchaser procured; B. admitted that he had acquired an interest in the property after the sale, but denied that he had an interest in it at the time of the sale; and on the trial below R. offered evidence with respect to the price received by B. for his interest in the property at the sale thereof made by the latter three years after the sale for which compensation was claimed in the suit; the evidence was offered for the purpose of showing that B. was, at the time of the last mentioned sale, a partner in the purchase made thereat. *Held*, that the exclusion of the testimony was not error. *Ruckman v. Bergholz*, 38 N. J. L. 531.

Sec. 815. Evidence that buyer did not have cash but able to obtain by next day, able to buy.

Where the written contract by which defendant employed plaintiff as broker to sell lands fixed the selling price per acre, and provided for the payment of a certain sum in cash by any purchaser obtained, evidence that the purchaser obtained by plaintiff under the offer to buy at the price named in the contract did not have in his possession at the time of the offer sufficient funds to make the cash payment required, but could have obtained them on the morning of the next day, was sufficient to show that he was able to buy. *McDermott v. Mahoney*,

139 Iowa, 292, 106 N. W. 925, affirmed 115 N. W. 32. See also Sec. 464.

Sec. 816. Witnesses for defendant may be questioned as to the interest purchasers had in the land.

In an action on account for commissions transferred to plaintiff, a witness for defendant may be questioned as to the interest the purchasers had in the land, and as to what induced defendant to make the sale, such questions being pertinent to matters introduced by plaintiff. *Ivy Coal & Coke Co. v. Long*, 139 Ala. 535, 36 S. 722. •

Sec. 817. In cross-examination it was proper to ask assignor about transaction.

In an action on an account for commissions transferred to plaintiff, it was proper on cross-examination to question the assignor, who rendered the services, relative to the negotiations between the purchasers of land, the plaintiff, and himself as to the transaction as consummated. *Id.*

Sec. 817a. On cross-examination defendant not required to answer as to whether note had been paid.

In an action for commissions for a sale of land under a contract alleged to have been made with defendant's agent, where there was evidence tending to show that the contract was entered into between the agent and defendant for an exchange of land by each, defendant agreeing to pay the agent a certain commission, the defendant testified that he settled with the agent and gave him a note for the amount before he had any knowledge that plaintiff was in any manner connected with the transaction, plaintiff could not on cross-examination, require the defendant to answer as to whether the note had been paid. *Quale v. Hazel*, 19 S. D. 483, 104 N. W. 215.

Sec. 817b. On cross-examination defendant could show he had become surety on plaintiff's note to a bank.

In an action for a real estate broker's commissions defendant could show, on plaintiff's cross-examination that defendant had become a surety on plaintiff's note to a bank. *Yates v. Bratton* (Tex. Civ. App. '08), 111 S. W. 416.

Sec. 818. Evidence of the sale of property, to show defendant's good faith in refusing loan.

In an action by a loan broker for commissions against a client who had refused to complete a loan after a lender had been secured, evidence that the client had sold the property to supply him with the needed funds, is admissible as bearing on the credibility of his testimony that he had refused the loan because an existing mortgage could not be paid off before maturity. *Payne v. Williams*, 178 N. Y. 589, 70 N. E. 1104.

Sec. 818a. Acts of purchaser admissible on question of good faith.

While the acts of a purchaser procured by a broker employed to obtain a purchaser subsequent to the time fixed for the performance of the contract can not affect the rights of the broker to his commissions, such acts may be looked to to determine whether what the purchaser did to establish the broker's rights was done in good faith, and whether such prior acts had the legal effect claimed for them. *Little v. Herzinger*, 34 Utah, 337, 97 P. 639.

Sec. 819. Defendant may show influence other agents exerted on sale.

In an action for commissions, under a contract of agency for effecting a sale of real estate, the defendant, on the issue of who effected the sale, is entitled to show the influence other agents exerted on the sale before and after the contract with plaintiff. *Smiley v. Bradley*, 18 Colo. App. 191, 70 P. 696.

Sec. 820. Evidence of dealings to establish relation of principal and agent.

In an action for a real estate broker's commissions for negotiating a purchase which defendant refused to consummate, evidence that before the agreement for purchase was reached plaintiff had submitted an offer to the owner as the purported agent of defendant, was admissible to show the relationship of the parties and plaintiff's offer to purchase the property for defendant. *Hanna v. Espalla*, 148 Ala. 313, 42 S. 443.

Sec. 821. Where defendant demanded return of contract, can show it referred to another transaction.

Where, in an action for a broker's commissions for negotiating a purchase which defendant refused to consummate, there was testimony for plaintiff that defendant had demanded the return of a writing executed September 10, alleged to show a contract of employment, at the same time recognizing his obligation to pay plaintiff a commission, defendant should have been permitted to show that the paper he demanded referred to another transaction, and that at the same time plaintiff presented a statement for other commissions, not including the one sued on, and did not, prior to October 20, make demand for the sum claimed. *Id.*

Sec. 822. Plaintiff to purchase must show seller able to convey a good title.

Under a contract whereby defendant agreed to pay plaintiff \$100 for obtaining a sale to him of certain real property, plaintiff, in an action for the commission, must show that the person produced as such owner was willing to sell at the stated price, and able to convey a merchantable title. *Anderson v. Johnson* (N. D. Sup. '07), 112 N. W. 139. Compare Sec. 290.

Sec. 823. Evidence of defendant tending to show that option was the only agreement.

Where, in a suit for a commission for finding a purchaser for land, plaintiff alleged that the owner listed it with brokers, who listed it with plaintiff's firm, with the owner's consent, the owner could show that shortly before the alleged listing with such brokers, he gave them an option to purchase a tract, including the land on account of which the commission was claimed, as tending to corroborate the owner's claim that the option contract was the only agreement between him and the brokers. *Sterling v. De Laune* (Tex. Civ. App. '07), 105 S. W. 1169.

Sec. 824. Evidence of prior contract as to compensation competent where conflicting.

In an action by a real estate broker to recover commissions, where the evidence is conflicting as to the rate of compensa-

tion, evidence of a prior contract between the same parties for the sale of the same property and of the compensation therein agreed to be paid is competent. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

Sec. 825. Affirmative answer of purchaser that he was ready, etc., not objectionable as an opinion.

In an action by a broker for commissions for procuring a purchaser, the affirmative answer of the purchaser procured by the broker to the question as to whether he was ready, willing and able to comply with the terms of the sale, was not objectionable as the opinion of a witness. *Clark v. Wilson*, 91 S. W. 627, 41 Tex. Civ App. 450. Compare *N. W. Packing Co. v. Whitney* (Cal. App. '07), 89 P. 981.

Sec. 826. Question to assumed principal, whether her husband was acting as her agent, not objectionable.

A question addressed to an assumed principal in which she is asked whether her husband was acting as her agent, is not objectionable as calling for a legal conclusion. *Knapp v. Smith*, 27 N. Y. 277.

Sec. 827. Conversations with purchaser's agent allowable to show unwillingness of purchaser.

As tending to show that plaintiff procured a purchaser for defendant's timber, he may testify as to conversations with the purchaser's agent, at the appointed time and place for closing up the purchase, showing his unwillingness to buy at the stipulated terms. *Obenauer v. Solomon*, 151 Mich. 570, 115 N. W. 696, 15 D. L. N. 31.

Sec. 828. Defendant may show another agent employed by him was the procuring cause of the sale.

Where a real estate agent sues for commissions, defendant is entitled to show that the efforts of plaintiff were not the procuring cause of the sale, and to do this he may introduce evidence to the effect that the efforts of another agent employed by him were the procuring cause. *Mead v. Arnold*, 131 Mo. App. 214, 110 S. W. 656. See also Sec. 896.

Sec. 829. Defendant entitled to introduce in evidence letters on the question of plaintiff's employment.

Plaintiff, in an action by a broker for commissions for the sale of an office building, who had for nine years been defendant's agent for handling certain real estate for him, claimed authority, never revoked, to sell the building, which defendant denied ever having been given; four years before the sale they had an agreement as to plaintiff's management of this and other property of defendant, and plaintiff wrote defendant a letter reciting that, in accordance with their conversation of that date, he thereby stated his understanding of their agreement as to commissions he was entitled to for the management of defendant's properties, the one in question, with another, being named, following which were the terms, the commissions, and the duties to be performed, with no statement, however, with respect to sales; defendant's letter in reply stated that plaintiff's letter was practically correct, then gave the detailed terms of the employment of plaintiff as agent, and concluded, "this arrangement is not to be considered as including a sale of the property; I reserve the right to deal direct in case of a sale." *Held*, that defendant was entitled to have both letters introduced in evidence on the question of employment, and it was not enough to admit the concluding paragraph of defendant's letter, it losing much of its effect when standing alone. *Willard v. Ferguson*, 110 N. Y. S. 909, 125 App. Div. 868. See also Sec. 564.

Sec. 830. Proof insufficient to support recovery for the sale of a house.

Defendant, in an action by a broker for commissions, as owner of two semi-detached houses, gave a broker a written authority, without date, to sell the property, without describing it; defendant testified that the written authority was for the sale of the second house, and that it was given after the first house had been sold; six disinterested witnesses corroborated defendant, and the purchaser of the first house testified that she never saw the broker until after she had been negotiating with defendant personally. *Held*, insufficient to support a recovery of commissions for effecting a sale of the first house. *Herweg v. Molitor*, 110 N. Y. S. 241, 126 App. Div. 927.

Sec. 831. Any parol evidence relied on to make a binding contract must be clear and decisive.

Any parol evidence relied on to establish the authority of a broker to make a binding contract must be clear and decisive. *Stengel v. Sergeant* (N. J. Eq. '08), 68 A. 1106; *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 A. 1073. See also Sec. 18.

Sec. 831a. Where uncertainty exists identity may be established by evidence.

When the identity of a thing referred to in a written contract is left uncertain, it is proper to hear evidence to determine which one of two or more things answering the description was meant by the parties. *Peabody v. Dewey*, 51 Ill. App. 260.

Sec. 832. Evidence that fell short of authorizing the agent to sign a contract of sale.

After defendant had written several letters to her agent instructing him to sell her property for a specified price, the agent wrote her that several had declined her proposition, but that he was dealing with one who would pay a price less than that specified; she wired that she would sell for a sum between the specified and offered prices, if a sale could be made before a certain time; the agent sent the telegram to the third person, who replied that he would not increase his offer, asking the agent to submit it again, and nothing more; this the agent did, advising the defendant to accept the offer; but she instead of accepting, wired a third price at which she would sell; finally, upon the agent's informing her that he could do no better than the price offered, she telegraphed him that she would sell for such price, but would only pay half the commissions, and asked him to wire in case of acceptance. *Held*, that defendant's letters did not clearly authorize the agent to make, himself, a contract of sale binding on the principal, even on the terms given therein. *Stengel v. Sergeant* (N. J. Eq. '08), 68 A. 1106.

Sec. 833. Oral evidence allowable to establish an independent agreement to written contract.

A contract, where the owner of real estate, in order to induce an agent to accept a stipulated sum for his services in

effecting an exchange, agreed to pay him more if the sale proved satisfactory, could be established by parol evidence as an independent agreement, though the stipulation for payment of the first sum was in writing. *Blair v. Slosson*, 27 Tex. Civ. App. 403, 66 S. W. 112; *Bradley v. Bower* (Neb. Sup. '04), 99 N. W. 490.

Sec. 833a. Contract between owner and purchaser not evidence that broker found purchaser.

A written agreement by prospective purchasers with the owner of land to purchase it for a stated price is not sufficient proof, in an action by the real estate broker for his commissions, that he procured the purchasers, since that agreement is conclusive only between the parties to it. *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994.

Sec. 833b. Court may receive evidence after motion to dismiss petition for failure of proof has been made.

After plaintiff's evidence was closed a motion to dismiss for failure of proof was continued until the following day, at which time plaintiff offered to show that his principal knew of the contract to divide commissions. *Held*, that the evidence should have been received. *Dearing v. Sears*, 3 N. Y. S. 31.

Sec. 833c. Evidence of contract material to determine its terms.

Where the evidence was conflicting as to the terms of a broker's contract, whether the contract, as claimed by the broker was harsh and unreasonable, was material only to determine the terms of the contract in fact. *Lee v. Conrad* (Iowa Sup. '08), 117 N. W. 1096.

Sec. 834. Declarations during the negotiations with purchaser are admissible as part of the res gestae.

In an action for a broker's commissions, declarations of defendant's agents as to the broker's commissions, made at the time they were negotiating and closing the deal with the purchaser found by the broker, are admissible as part of the *res gestae*. *Fritz v. Chicago Grain & Ele. Co.*, 136 Iowa, 699, 114 N. W. 193; *Mechem on Ag. Sec.* 715.

Sec. 835. Declarations of owner after the sale inadmissible as part of the *res gestae*.

In an action in interpleader when the issue between the parties is as to the right to commissions for the sale of real estate, the declarations of the owner of the property sold, made some time after the sale has been effected, and in the absence of defendant to the effect that he thought plaintiff was entitled to the commission, are inadmissible. *Shipman v. Frech*, 3 N. Y. S. 932, 15 Daly, 151.

Sec. 836. Declarations.

The expression of opinions by the court as to the materiality of evidence in ruling upon offers of testimony, are not usually proper objects of exception, but declarations or statements may be assumed by the court, in the presence of the jury, with respect to its weight and materiality, as to be prejudicial and ground of exception by the aggrieved party. *Haug v. Hangan*, 51 Minn. 558, 53 N. W. 874. An agent's authority can not be proved by his declarations, nor by his acts done without the knowledge or authority of his principal. *Whitney v. Lake*, 91 Pa. St. 349; *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574; *Ehrenworth v. Putnam* (Tex. Civ. App. 1900), 55 S. W. 190. A person, not in actual possession but authorized to sell, is a mere broker, and his declarations can not be admitted to affect the title of his principal. *Pier v. Duff*, 63 Pa. St. 59. In an action for deceit arising out of an exchange of properties through a broker acting for defendant, evidence that defendant stated that his broker had made a mean trade for him, and that he had made a poor trade, warrants a finding that such broker was acting for defendant in effecting the exchange. *Arnold v. Teal*, 182 Mass. 1, 64 N. E. 413.

The question of whether a broker employed to procure a purchaser was the efficient cause of the sale, or whether the means employed by him and his efforts resulted in a sale, must be deduced from the facts relating to the transaction, and not from the conclusion of a witness. *Geiger v. Kiser* (Colo. Sup. '10), 107 P. 267.

Sec. 837. Self-serving declarations inadmissible as evidence.

In an action for commissions by a real estate broker on a contract under which it had earned its commissions, where the contract of sale was signed, defendant's self-serving declaration that the payment of commissions was to await the delivery of the deeds was of no effect. *Dike v. Haight*, 108 N. Y. S. 1066. In an action for a broker's commissions, a statement by plaintiff as to a sale of the land, and what he would be entitled to, was self-serving and inadmissible. *Leutschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

In an action for commissions for the sale of defendant's land, testimony of plaintiff that he expected to be paid for the alleged services was properly excluded. *Latta v. Lockman*, 139 Iowa, 626, 117 N. W. 962.

Sec. 838. Admissions against interest.

In an action by a real estate broker for commissions, defendant's admission that plaintiff procured the sale, as appears in the contract between the vendor and purchaser, was evidence for the plaintiff. *Dike v. Haight*, 108 N. Y. S. 1066.

Where, in an action by a broker for commissions on a sale of real estate, defendant's answer admitted the employment of plaintiff as a broker, and it appeared that the contract of exchange of properties negotiated by plaintiff was signed through his efforts, these facts took the case out of the purview of the Penal Act making it a misdemeanor for one to offer real estate for sale without written authority. *Hough v. Baldwin*, 99 N. Y. S. 545, 50 Misc. 546.

In a broker's action for compensation, declarations against interest by one who would share in the broker's commissions, and was therefore beneficially interested in the result of the action, were admissible in evidence. *Kinnane v. Conroy* (Wash. Sup. '09), 101 P. 223.

CHAPTER XIII.

ESTOPPELS.

Sec. 839. Estoppel by representations or conduct.

One may be estopped by his representations or conduct from repudiating a transaction. *Christensen v. Wooley*, 41 Mo. App. 53; *Dutcher v. Empire League*, 113 N. Y. S. 1083.

Sec. 840. Objecting on one ground estopped to set up another.

Where defendant authorized a broker to sell certain lots for \$1,800 cash, and the broker sold for \$50 cash, and the remainder on delivery of the deed and abstract, but defendant refused to complete the sale, claiming that the authorization was \$1,800 net to him, without deduction of the broker's commissions, the defendant was estopped subsequently to assert, in an action brought by the broker to recover compensation for his services, that he was not bound to pay the broker, because the sale did not comply with his instructions as to payment of price. *Donley v. Porter*, 119 Iowa, 542, 93 N. W. 574; *Mooney v. Elder*, 56 N. Y. 238; *Railway Co. v. McCarthy*, 96 U. S. 258, 267; *Fuller v. Brady*, 22 Ill. App. 174; *Fiske v. Sinle*, 87 Cal. 313, 25 P. 430; *Crouse v. Rhodes*, 50 Ill. App. 120; *Johnson v. Wright*, 124 Iowa, 61, 99 N. W. 103.

In other jurisdictions it is held that unless the broker has suffered injury by reason of the defendant not objecting at the time upon the ground subsequently sought to be asserted, the defendant may still avail himself of the defense. *The List & Son Co. v. Chase*, 80 O. St. 42; *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974; *Provident Tr. Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030; *Stearns v. Jennings*, 128 Wis. 379, 107 N. W. 327.

Defendant, who contracted to pay plaintiff a certain amount broker's commissions if plaintiff would buy for him the coal on a certain farm, is not estopped to assert, as against plain-

tiff's claim for commissions, that one of the owners was an infant, so that a binding contract for the sale of all the coal which was contemplated was not obtained; he not having employed plaintiff with knowledge of the infancy of such owner, though he had not based his refusal to carry out the contract of purchase on such infancy. *Mitchell v. Weddington* (Ky. Ct. App. '09), 122 S. W. 802.

Sec. 841. Owners estopped to claim that because they refused to carry out agreement there was no sale.

Where the owners of real estate agreed to sell to a purchaser procured by their broker, and the purchaser paid \$10 of the price, the owners were estopped, when sued for commissions for making the sale to assert that because they subsequently refused to carry out their agreement there was no sale. *Gwin-nup v. Sibert*, 106 Mo. App. 709, 80 S. W. 589. See also Sec. 861.

Sec. 842. After acceptance of purchaser owner can not object to pay broker on account of purchaser's inability to pay for the property.

One who employs a broker to negotiate a sale can not, in an action for the commissions, avail himself of the objection that the customer is unable to pay for the premises, if the vendor has accepted the customer as satisfactory, and has conveyed the premises to him. *Travis v. Graham*, 48 N. Y. S. 736, 23 App. Div. 214. Compare Secs. 694, 726.

Sec. 843. Owner estopped to say contract too indefinite.

An offer to buy 290,000 feet of land to be taken from a parcel containing 500,000 feet, said 290,000 feet to be divided as to front and back lands from the whole parcel as nearly equal as is possible, where accepted by the owner of the land, entitles the broker employed to find a purchaser therefor to his commissions, and the owner will not be heard to say it is too indefinite. *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793.

Sec. 844. Purchaser who paid money to vendor's agent estopped to deny the latter represented him.

A purchaser who paid money to a real estate agent employed by his vendor to induce the agent to assist him in the trans-

action is estopped to deny that the agent is his agent, when suit is subsequently brought by the vendor to reform the deed which was drawn by the agent for both parties, wherein a reservation of growing crops was by mistake omitted, since the mistake of the agent is the mistake of both principals. *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709; *Seymour v. Slide, etc., Gold Mines*, 42 Fed. 633. See also Sec. 258.

Sec. 845. Receipt of \$300 estopped owner to say contract of agency was invalid.

Plaintiff, vendee, who brought suit against agents to recover money paid on an invalid contract of sale, can take nothing by the fact that the appointment of the agent to sell the land was verbal; the receipt of \$300 by the owners would estop them to deny the agency. *Bogart v. Crosby*, 80 Cal. 195, 22 P. 84; *Morris v. Terrill*, 2 Rand. (Va.), 6.

Sec. 846. In a suit against broker to account, vendor estopped to allege invalidity of sale.

Where a vendor of land instituted a suit against his agents, real estate brokers, to recover a part of the purchase money in their hands and retained by them as commissions, he was thereby estopped to allege the invalidity of the sale as against said brokers, and therefore it was immaterial to inquire whether such sale was or was not valid under the statute of frauds. *Christensen v. Wooley*, 41 Mo. App. 53.

Sec. 847. Principal estopped to claim rent paid by tenant to purchaser.

Where a general agent, having power to sell a piece of land, limited only in the method of payment, and the agent having control of a building on the land, upon a sale of the land at public auction, announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon the payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant. *Knox v. Barnett*, 18 Fla. 594.

Sec. 848. Parties discovering double agency pending negotiations and not dissenting thereto estopped.

If pending negotiations the parties discover the double agency of the broker, and, without objecting, go on and, nevertheless, consummate the transaction, they can not, by reason thereof, refuse to pay commissions. *Cassaday v. Carrahan*, 119 Iowa, 500, 93 N. W. 386.

Sec. 849. Bank receiving benefits estopped to deny authority to sell.

Where a bank agrees to pay a real estate broker a commission on the sale of land it can not set up as a defense that, under the law of the State in which the land is situate a bank is prohibited from dealing in real estate, where it has availed itself of the benefits of the sale. *Church v. Johnson*, 93 Iowa, 544, 61 N. W. 916.

Sec. 850. Vendee knowing of fraud of agent can not insist on the validity of the sale.

Where one takes a conveyance from an agent authorized to sell and convey land, knowing of the fraud or breach of trust of the agent, he can not insist on the validity of the sale. *Morris v. Terrill*, 2 Rand. (Va.) 6. See also Sec. 845.

Sec. 851. Landlord estopped to deny agent's authority to accept waiver of privilege of renewal.

Where a landlord accepted the waiver of the tenant's privilege of renewal, procured by his agent from the tenant, he was estopped to deny the agent's authority in the premises. *No. 121 Madison Ave. v. Osgood*, 18 N. Y. S. 126.

Sec. 852. Broker not estopped by error to plead incorrectness.

The delay of a broker to complain of an order in regard to his commissions on a sale made by him for the receiver of an insolvent bank, does not estop him from asserting its incorrectness, in the absence of prejudice occasioned thereby. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974. See also Sec. 840.

Sec. 853. Agent not estopped to claim commissions because memo. of agreement described defendant as owner of property to be sold.

An agent under a contract to sell real estate on commission is not estopped from claiming his commissions because the memorandum of the agreement describes defendant as the owner of the property to be sold. *Condee v. Barton*, 62 Cal. 1.

Sec. 854. Seller estopped to allege its representative had no authority to employ a broker.

Where a real estate broker makes a sale, the seller accepting the sale and claiming benefits thereunder is precluded from setting up, as against the broker's claim for commissions, the want of authority in its representative to employ such broker. *Watkins Land Mtge. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72.

Sec. 855. Principal not estopped to show commissions not to be paid for until contract fully completed.

In an action for commissions for procuring purchasers of land, a letter from the defendant to the plaintiffs stating that they had not received all the earnest money, part of it remaining in escrow in the bank until it should be determined if they were entitled to it, and that they would pay the balance as soon as they received that amount, did not constitute an estoppel against a claim by the defendants that they were not to pay commissions until the contract was fully completed. *Tracey Land Co. v. Polk Co. Ld. & Loan Co.*, 131 Iowa, 40, 107 N. W. 1029.

Sec. 856. Joint owner not repudiating agent's fraud, estopped to deny connection therewith.

A joint owner of real estate who consents to a listing thereof by his co-owner with real estate agents for sale, receives part of the consideration, and never repudiates the sale made by the agents, after discovering that they were guilty of fraud, is estopped to deny connection with the fraud, but will be held liable only to the extent of the benefit actually received. *Alger v. Anderson*, 78 Fed. 729. See also Sec. 329.

Sec. 857. Brokers purchasing bonds, pretending to act for third parties, estopped, when found worthless, to recover.

Plaintiffs, as brokers, entered into a contract for the purchase of certain bonds, claiming to act for an undisclosed principal, and stipulating that they should in no manner be held liable on the contract, which, as they had reason to believe, was made by defendant under a misapprehension as to the value of the bonds; in fact, they were acting for themselves, and there was no other principal. *Held*, that they could not maintain an action on the contract, not as agents for an undisclosed principal, because no such principal existed, nor as principal, because by their fraudulent misrepresentation they had secured immunity from liability on the contract as such, and estopped themselves from claiming rights which were correlative with such liability. *Paine v. Loeb*, 96 Fed. 164, 37 C. C. A. 434.

Sec. 858. Equitable owner estopped to deny agent's authority.

A contract of sale of realty was made by one having no title nor authority in writing to execute such an instrument; the attorney for the purchaser was informed by the equitable owner that such person was authorized to sell, and was directed to see him in reference to the matter. *Held*, under code of civil procedure, that such statement was a ratification of the agent's authority which estopped the equitable owner from denying it. *Gregg v. Carey*, 4 Cal. App. 354, 88 P. 282.

Sec. 859. Broker's silence ineffective to estop from recovering commissions.

Where defendant, a real estate broker, contracted to pay plaintiff, another broker, one dollar per acre if he would furnish a purchaser for a certain farm at \$37.50 per acre, including the crops, and defendant, with full knowledge of plaintiff's rights thereunder, voluntarily sold the farm for \$35 per acre, without the crops, to a purchaser furnished by plaintiff, the latter was not estopped by his silence, after introducing such purchaser and defendant had informed him of the rise in the price, to claim full commissions on the subsequent consumma-

tion of the sale. *Provident Tr. Co. v. Darraugh*, 168 Ind. 29, 78 N. E. 1030. See also Sec. 115.

Sec. 860. Broker turning property over to another to sell, estopped to claim commissions on sale by latter.

An agent for the sale of lands who turns the property over to another to sell, with consent of the owner, and thereafter does nothing to effect a sale, loses his right to a commission, not on the ground of assignment, but because of a waiver of his right to make a sale; and he is estopped to assert any interest in the commissions resulting from the sale made by the other. *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775.

Sec. 861. Owner concluding sale with purchaser furnished by broker estopped to claim it was done independently.

Where defendants gave plaintiff an option to effect a sale of coal properties, if sold within a certain time, on a stipulated commission, and agreed to assist plaintiff in the sale thereof, defendants will not be heard to say that a sale to one with whom plaintiff was negotiating, made during the continuance of the option, was the result of their independent efforts. *Wells v. Hocking Valley Coal Co.*, 137 Iowa 526, 114 N. W. 1076. See also Sec. 841.

Sec. 862. When action tried on theory of written contract, estopped on appeal to claim it was verbal.

Where an action was tried by both parties on the theory that the contract sued on was a written one, and defendant requested several instructions which so stated, he could not, on appeal, be heard to contend that the contract was verbal. *McDermott v. Mahoney* (Iowa Sup. '06), 106 N. W. 925.

Sec. 862a. That broker and purchaser conspired to defraud vendor did not estop the purchaser to sue for misrepresentation as to the acreage purchased.

That vendor's broker, the purchaser and another conspired to defraud vendor by retaining a part of the price, did not estop the purchaser to sue the vendor for the broker's misrepresentation as to acreage. *Farris v. Gilder* (Tex. Civ. App. '09), 115 S. W. 645.

Sec. 862b. Conspiracy of parties to sale to deprive broker of commissions.

It is immaterial to a real estate agent's rights to a commission on a sale procured by him that he did not obtain an offer for his principal on terms as good as those on which the sale was made, where the parties to the sale conspired to deprive him of his commissions. *Lipscomb v. Mastin* (Mo. App. '10), 125 S. W. 1177.

CHAPTER XIV.

SECTION.

863. Dismissal, when proper.

864. Dismissal, when error.

865. Non-suit.

SECTION.

866. *Prima facie* case.

867-873. Issues.

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Sec. 863. Dismissal of action, when proper.

A motion to direct a verdict for defendant without special ground, should be granted where the plaintiff's evidence wholly fails to show such performance on his part as is necessary to entitle him to recover. *Gerding v. Haskins*, 141 N. Y. 514, 36 N. E. 601. Where an action is brought to recover commissions on a loan which a certain person is alleged to have negotiated for defendants, in the absence of proof that such person was authorized to act as defendant's agent in the transaction, the action will be dismissed, without being submitted to the jury. *McLaughlin v. Ranger*, 66 N. Y. S. 450, 32 Misc. 732.

Sec. 864. Dismissal of action, when error.

Evidence in an action to recover commissions for the sale of real estate, was held to show that the owner had reasonable cause to believe that the party to whom he sold the property was sent to him by the agent, so as to render it error to dismiss the case. *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578.

Sec. 865. Non-suit.

In the absence of any evidence to show that the sale by defendant to his brother and the subsequent conveyance by him to B., was done to defraud plaintiff of his commissions, he could not recover them from defendant. *Bennett v. Kidder*, 5 Daly, (N. Y.) 512; *Ham v. Weber*, 43 N. Y. S. 1059, 19 Misc. 485.

Sec. 866. Prima facie case.

Testimony that a deed was tendered to the principal, "in pursuance of an agreement between" the parties, is sufficient *prima*

facie, to sustain a finding that it was delivered within thirty days. *Beebe v. Roberts*, 3 E. D. Smith (N. Y.) 194. A contract of sale signed by the purchaser, unilateral when tendered to the vendor, is *prima facie* evidence of the purchaser's readiness and willingness to buy. *Flynn v. Jordal*, 124 Iowa 457, 100 N. W. 325. Evidence by plaintiff that he did business as a real estate agent, though he assisted in the foundry business, and that the usual commissions allowed such agents for selling property of the character in suit was five per cent., was competent as *prima facie* evidence of value. *Ashby v. Holmes*, 68 Mo. App. 23. Proof that a party has executed a formal contract to convey certain property in exchange for other, is sufficient *prima facie* evidence of his title thereto, in an action by a broker for commissions in effecting an exchange. *Muscovitz v. Hornberger*, 46 N. Y. S. 462, 20 Misc. 558.

Sec. 867. Issue as to which of several brokers effected a sale.

On the issue of which of several rival brokers effected a sale so as to entitle him to commissions, it is proper to show by the purchaser his state of mind regarding the purchase after he had left the broker claiming the commission. *McGuire v. Carlson*, 61 Ill. App. 696.

Sec. 868. Issue as to whether defendant agreed to pay plaintiff twenty-five cents per acre and five per cent. on balance.

In an action for a balance claimed to be due for selling a large tract of land for defendant, where the issue is whether defendant agreed to pay plaintiff the sum of twenty-five cents per acre and a commission of five per cent. on the balance, the testimony of a real estate agent is competent to show that the compensation claimed by plaintiff is reasonable and not unusual. *Greer v. Laws*, 56 Ark. 37, 18 S. W. 1038.

Sec. 869. Issue as to indebtedness existing at beginning of action for undisclosed services.

In an action for a broker's commissions, the only allegation in plaintiff's complaint, showing the liability of defendant, was that within two years prior thereto the defendant became indebted to plaintiff's assignor in a certain sum for services ren-

dered by him to the defendant at his special instance and request. *Held*, that the only issue tendered by the plaintiff was the indebtedness existing at the time the action was commenced for certain undisclosed services, and on that issue it was competent for defendant to offer, and for the court to consider, any evidence which would tend to show that, even though the services were rendered, they did not create an indebtedness against the defendant, and defendant's failure to set up in answer, as a defense, that the assignor had received a commission from the purchaser, did not preclude him from offering evidence thereof, or the court from considering its effect. *Raner's Law & Coll. Co. v. Bradbury*, 3 Cal. App. 256, 84 P. 1007. Compare Sec. 678.

Sec. 870. Issue in action for commissions for sale of real estate to stock company.

In an action for commissions for effecting a sale of land, the petition alleged that the land was placed in plaintiffs' hands by a written contract of sale at the price of \$50,000, and that they were to receive ten per cent. commission on the amount realized by the defendant, to be paid when the purchase price was received, whether the land was sold directly or through the organization of a stock company and the money value of the lands realized by a sale of the stock; that a mining company was organized to which defendant conveyed the land, receiving practically all of the stock of the company, the par value of which was \$150,000, that defendant had received \$100,000 from the sale of the stock, on which amount plaintiffs were entitled to commissions. *Held*, that plaintiffs were not entitled to show that after selling 300 shares of stock at 33 1/3 cents on the dollar, and having a purchaser ready to buy all the stock at that figure, defendant raised the price to forty cents, the action not being for damages for breach of contract, but proceeding on the theory of an actual sale. *Cosgrove v. Leonard Mer. & Realty Co.*, 175 Mo. 100, 74 S. W. 986.

Sec. 871. Issue as to procuring cause of sale, what not controlling.

The fact that plaintiff did not inform defendant that the purchaser was his customer before the sale, was not controlling

on the issue as to whether plaintiff was the procuring cause of the sale to him. *Metcalfe v. Gordon*, 83 N. Y. S. 808, 86 App. Div. 368.

Sec. 871a. To avoid a contract issue must be presented by the pleadings.

A land contract entered into by the purchaser's agent can not be avoided by the purchaser, in a suit to enforce the purchase money notes, because the agent also represented the vendor, where that fact was not presented in the pleadings. *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. 82.

Sec. 872. Issue presented by amendment to answer false and misleading.

On the trial of a cause the defendant obtained leave to amend his answer by alleging "that after making the sales named they (plaintiffs) complained that the prices were too high, as named by defendant, and made no effort to sell the same, but neglected the same to the defendant's damage and injury." *Held*, that the matter involved in the amendment, not being pertinent to the case, was calculated to raise a false issue and distract the attention of the jury from the real questions for their determination. *Marshall v. Gobel*, 32 Neb. 9, 48 N. W. 898.

Sec. 873. Issue whether authority to make a sale was subject to wife's approval.

In an action by a broker for commissions for making a sale of realty, where the defense set up in the answer was, that the broker was employed to sell the property upon the express understanding that any sale of the property would be subject to the approval of the owner's wife, and that the wife did not consent to the sale made by the broker, but disapproved of it, and refused to sign the deed, the issue to be determined was not, whether the sale made by the broker was subject to the wife's approval, but rather, whether or not authority to make a sale was conditioned upon the wife's approval. *Baker & Co. v. DeVitt* (Tex. Civ. App. '08), 110 S. W. 528.

Sec. 874. Variance, broker can not declare as for performance and recover damages for breach.

Under a written agreement of a land owner to pay a broker a certain sum if he should send or cause to be sent to the land owner a person with whom the latter "may see fit and proper to effect a sale or exchange of the land," the broker can not recover the sum stipulated without proof of the sale or exchange of the land, nor on a *quantum meruit* for services in negotiations for such sale or exchange, without proof that such negotiations were rendered fruitless by the fault of the land owner. *Walker v. Tirrell*, 101 Mass. 257; *Drury v. Newman*, 99 Mass. 256.

Sec. 875. On claim for selling property, broker can not recover as a middleman.

A complaint which alleged that complainants were real estate brokers and that defendant, well knowing the fact, gave them an option on his property and agreed to pay a commission for their services in case of a sale, and that they procured a purchaser, and in pursuance of negotiations initiated by them a sale was effected, stated a cause of action on the theory that the plaintiffs were brokers, and hence they could not recover on proof that they were mere middlemen. *Southack v. Lane*, 65 N. Y. S. 629, 32 M. 141; *Walker v. Osgood*, 98 Mass. 348.

Sec. 876. In order to take advantage of variance defendant must make timely objection.

In order to take advantage of a variance between the allegations of a petition and the proof, defendant must make objection in the trial court to the introduction of evidence on that ground and show by affidavit, in what respect he has been misled thereby. *Fisher, etc., R. E. Co. v. Stated R. Co.*, 159 Mo. 562, 62 S. W. 443; *Gregg v. Loomis*, 22 Neb. 174, 34 N. W. 355.

Sec. 877. Allegation to pay 5 per cent. on any amount, not sustained by evidence if sold for \$5,000.

An allegation that defendant agreed to pay 5 per cent. on the amount for which he should sell the mill of defendant,

whatever it might amount to, is not sustained by evidence that defendant agreed to pay plaintiff 5 per cent. if he would sell the mill for \$5,000; and this forms a fatal variance between the contract declared on and that proved. *Menifee v. Higgins*, 57 Ill. 50.

Sec. 878. Allegation that rights sold comprised 50,000 acres not sustained by proof of 35,000.

Counts in a complaint alleged that plaintiff acted for a third person in a sale to defendant of turpentine rights belonging to a third person; that the rights sold extended to the trees comprised in 50,000 acres, that the consideration promised to defendant was a net price per acre, to be paid to the third person, and commissions to be paid to plaintiff; the evidence showed that what was actually sold was the third person's turpentine rights then owned within a described territory said to contain 50,000 acres, less 3,000 acres reserved, together with such turpentine rights within that territory as might be acquired by the third person within a fixed period; the rights so owned and sold, including subsequent acquisitions did not extend to land exceeding 35,000 acres. *Held*, a fatal variance between the allegations and the proof. *Moses v. Beverly*, 137 Ala. 473, 34 S. 825.

Sec. 879. No variance between allegation for fee on cost of houses, and proof including the grounds.

In an action by a real estate broker for commissions the declaration alleged that plaintiff rendered services in procuring for defendants a contract for the erection of a number of houses, and that defendants agreed to pay him a commission of one per cent. of "the amount of the contract price for the erection of said houses." Plaintiff claimed commissions on the sum, which the evidence showed included both the cost of the houses and of the lands on which they were erected, this entire sum being secured by mortgage to defendants from the other party to the contract; the contract for commissions was oral, and plaintiff testified that both parties understood that the commission was to be calculated on the total amount of the mortgages. *Held*, that there was no material variance between the

pleadings and the proof. *Richards v. Richman*, 5 Pennewill (Del.) 558, 64 A. 238; *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381.

Sec. 879a. Slight excess in acreage not a material variance.

Findings of fact in an action for commissions for the sale of land, that the purchasers to whom the agent sold took 320 acres, did not limit the amount of land sold to 320 acres so as to defeat the action, the authority being to sell 327 acres, where, in answer to another question, if there was an excess over 320 acres, to state how many acres of such excess each of the purchasers agreed to take, the jury found that one purchaser agreed to take $3\frac{1}{2}$ acres, and another $3\frac{1}{2}$ acres. *Howell v. Denton* (Tex. Civ. App. '08), 113 S. W. 314.

Sec. 880. Agreement for sale and proof of an exchange, not a fatal variance.

Where a declaration alleges an agreement on a "sale" of real estate, proof of an exchange of the property is not a fatal variance, if defendant is not misled. *Whitaker v. Engle*, 111 Mich. 205, 69 N. W. 493; *Park v. Towne* (S. D. Sup. '08), 116 N. W. 1123; *Clark v. Allen*, 125 Cal. 276, 57 P. 985.

Sec. 880a. No material variance between allegations and proof.

There is no material variance between the petition, in an action by a broker for commissions, which alleges his employment to procure a purchaser for a specified commission, the procurement of a purchaser, and the subsequent sale of the land to him, and the evidence, which shows that the owner and the purchaser procured by the broker entered into an enforceable contract for the sale and purchase of the land, and that the owner failed to perform, though the purchaser was ready and willing; the word "sale" not being limited to a transaction where the legal title is conveyed to the purchaser. *Sanderson v. Wellsford* (Tex. Civ. App. '09), 116 S. W. 382.

Sec. 881. No variance where plaintiff was to be paid \$60 for services and proof of 2 per cent. on \$3,000.

There is no variance between the pleadings and proof, where the petition avers that plaintiff was to receive \$60 for his

services, if he assisted in selling certain realty, and the proof of plaintiff shows that he was to receive two per cent. on the amount for which the property should be sold or exchanged, and that it was sold for \$3,000. *Rembolz v. Bennett*, 86 Mo. App. 174.

Sec. 882. Claim for given sum and proof of smaller no variance where defendant was not misled.

Where plaintiff claims he is entitled to a given sum under a contract, he is entitled to recover, though the proof shows that he was entitled to a smaller sum, unless the variance has misled defendant. *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594.

Sec. 883. On allegation of special contract, can not recover on implied agency.

Under an allegation of a special contract of employment to sell property, recovery can not be had upon an agency implied from an acceptance of the agent's services. *Bassford v. West*, 124 Mo. App. 248, 101 S. W. 610.

Sec. 884. Contract made in April, not sustained by proof of similar made in August.

Where the petition in an action by a broker for commissions sets forth a cause of action based on a contract of employment entered into in April, there can be no recovery on proof showing a contract made in August following, containing similar terms, and the court should either direct a verdict for defendant, or permit an amendment making the pleading conform to the proof. *Hurst v. Williams*, 31 Ky. L. R. 658, 102 S. W. 1176.

Sec. 884a. Variance between allegations and proof.

Where, in an action by a broker for commissions for having procured a purchaser for defendant's land, the plaintiff alleged that he procured a certain person as purchaser, and the evidence showed that such person was acting as agent for an undisclosed principal, there was a variance. *Mott v. Minor* (Cal. App. '09), 106 P. 244.

Sec. 884b. Variance between allegation and proof.

Where, in a suit for broker's commissions upon an express contract, plaintiff claimed that he was to receive all of the selling price above \$30 per acre, and defendants denied any contract for commissions, asserting that they employed plaintiff as an attorney only, they could not on the trial prove an express contract different from the one sued on; to-wit: that they were to receive a net profit of 50 per cent. on the transaction. *Dempster v. Cochran*, 174 Fed. 587.

Sec. 885. Evidence at substantial variance with allegations inadmissible.

The complaint must allege either performance or a valid excuse for non-performance, and the proof must conform to the allegations of the petition. *Daly v. Russ*, 86 Cal. 114, 24 P. 867; *Norman v. Reuther*, 54 N. Y. S. 152, 25 Misc. 161; *Yarborough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645; *Martin v. Fagan*, 88 N. Y. S. 472, 95 App. Div. 154; *Hoeftling v. Hambleton*, 84 Tex. 517, 19 S. W. 689.

Sec. 886. Allegation that land was conveyed to two and proof of to but one, not a material variance.

In an action for a broker's commissions on a sale of land, where the complaint alleges that the land was conveyed to two persons, and the finding is that it was conveyed to one of these, the variance is not a material one. *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23.

Sec. 887. Variance in date not material, where contract was made before the sale and within the time.

In an action to recover commissions under a contract for the sale of land, proof that the contract was made on the exact date alleged is not required, since, while it is necessary to allege the date with convenient certainty, it is sufficient if shown to have been prior to the consummation of the sale and within the time prescribed by the statute of limitations. *Dillard v. Olalla Min. Co.*, 52 Ore. 126, 96 P. 678. *Contra, Fortran v. Stowers* (Tex. Civ. App. '08), 113 S. W. 631.

Sec. 887a. Variance in the terms of contract released agent from liability.

A real estate agent who received a part payment of the purchase money on a sale, conditioned that the offer be accepted by the owner on the terms and conditions specified or the money be returned, is not liable in an action by the purchaser for the money, if the offer was accepted by the owner, and if, at the time of acceptance, the owner and purchaser, by mutual agreement, vary the terms and conditions upon which the agent sold. *Fowler v. Quall*, 36 Kan. 507, 13 P. 784. See also Sec. 293.

CHAPTER XV.

QUESTIONS TO BE DETERMINED BY THE JURY.

Sec. 888. In an action for commissions, whether parties entered into a contract, a question for the jury.

In an action to recover commissions for purchasing property for defendant, whether a contract such as stated in the complaint was entered into, was a question for the jury, and it was error to direct a verdict for plaintiff. *Anderson v. Johnson* (N. D. Sup. '07), 112 N. W. 139; *Horwitz v. Pepper*, 128 Mich. 688, 87 N. W. 1034; *Shultz v. Eberle*, 124 Wis. 594, 102 N. W. 1055; *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037; *Mead v. Arnold*, 131 Mo. App. 214, 110 S. W. 656.

Sec. 889. If party adduces evidence to justify a verdict, error to take from the jury.

It is the peculiar province of the jury to pass upon questions of fact, and the issues of fact, as well as of law submitted to the court for determination. A jury not having been waived, it was error for the court to undertake to decide upon the weight of the evidence, and withdraw from the consideration of the jury, a phase of the controversy upon which plaintiff was entitled to have them pass. *Morey v. Harvey*, 18 Colo. 40, 31 P. 719; *Blackwell v. Greenbaum*, 50 Ill. App. 143; *Ryan v. Page*, 123 Iowa, 246, 98 N. W. 768; *Tracey Ld. Co. v. Polk Ld. & Ln. Co.*, 131 Iowa, 40, 107 N. W. 1029; *West v. Prewitt*, 19 Ky. L. R. 1480, 43 S. W. 467; *Wright v. Young*, 176 Mass. 100, 57 N. E. 212; *Rogers v. Evan. Bap. Ben., etc., So.*, 168 Mass. 592, 47 N. E. 434; *West v. Demme*, 128 Mich. 11, 87 N. W. 95; *Marx v. Otto*, 117 Mich. 510, 76 N. W. 7; *Crevier v. Stephen*, 40 Minn. 288, 41 N. W. 1039; *Finch v. Guardian Tr. Co.*, 92 Mo. App. 263; *Langstreth v. Korb*, 64 N. J. L. 112, 44 A. 934; *Gracie v. Stevens*, 171 N. Y. 658, 63 N. E. 1117; *Condict v. Cowdrey*, 123 N. Y. 463, 25 N. E. 946; *Reddin v.*

Dam, 64 N. Y. S. 611, 51 App. Div. 636; *Thornal v. Pitts*, 36 N. Y. Super. Ct. 379; *Meeslahn v. Englehard*, 20 N. Y. S. 900, 1 Misc. 412; *Meyer v. Strauss*, 58 N. Y. S. 904, 42 App. Div. 613; *Ringold v. Rhode*, 132 Pa. St. 189, 18 A. 1118; *Clendenin v. Pancoast*, 75 Pa. St. 213; *McCaffery v. Page*, 20 Pa. Super. Ct. 400; *Roeder v. Butler*, 19 Pa. Super. Ct. 604; *Blair v. Slosson*, 27 Tex. Civ. App. 403, 66 S. W. 112; *Center v. Conglomerate Min. Co.*, 23 Utah, 165, 64 P. 362; *Dunsmier v. Lowenburg*, 31 Canada Supreme Ct. 334; *Lamson v. Main*, 43 N. Y. Super. Ct. 24.

Sec. 890. Question of ability, readiness and willingness of customer to perform the contract is for the jury.

Whether the broker's customer was able, ready and willing to enter into the transaction is for the jury to determine. *McDermott v. Mahoney*, 119 Iowa, 470, 93 N. W. 499; *Hamill v. Basenhover*, 110 Iowa, 369, 81 N. W. 600; *Finch v. Guardian Tr. Co.*, 92 Mo. App. 263; *Middleton v. Thompson*, 163 Pa. St. 112, 29 A. 796; *Smye v. Groesbeck* (Tex. Civ. App. '02), 73 S. W. 972. And whether the failure to mention the name of the purchaser to the principal was a fraudulent concealment. *Newhall v. Pierce*, 115 Mass. 457; *Geery v. Pollock*, 44 N. Y. S. 673, 16 App. Div. 321; *Ames v. McNally*, 26 N. Y. S. 71, 6 Misc. 93; *Page v. Voorhies*, 16 N. Y. S. 101; *Vandevort v. Wheeling Steel, etc., Co.*, 194 Pa. St. 118, 45 A. 86; *McCaffery v. Page*, 20 Pa. Super. Ct. 400.

Sec. 891. Whether defendant prevented sale, exchange, lease or loan.

Whether the defendant prevented a sale, an exchange, a lease or a loan is for the jury to determine. *McDermott v. Mahoney*, 119 Iowa, 470, 93 N. W. 499; *Wright v. Young*, 176 Mass. 100, 57 N. E. 212; *Green v. Wright*, 36 Mo. App. 298; *Hancock v. Stacey* (Tex. Civ. App. '09), 116 S. W. 177.

Sec. 891a. Whether under the contract the broker's commissions were not to become due until a lease had been signed by the parties was a question for the jury.

In an action by a broker for commissions, evidence examined and held that, whether there was a contract between the

parties by which plaintiff's commission was not to become due until there had been a lease signed by the parties was a question for the jury. *Benedict v. Pincus*, 95 N. Y. S. 1042, 109 App. Div. 20. Also, as to whether commissions were to be paid before title passed. *Dekremen v. Clothier*, 96 N. Y. S. 525, 109 App. Div. 481.

Sec. 892. Whether the services were rendered with expectation of reward.

Whether the services performed by plaintiff in finding a purchaser were rendered with the mutual understanding that they were to be paid for, should have been submitted by the jury. *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116; *Darling v. Howe*, 14 N. Y. S. 561, 60 Hun. 578; *Bullock v. Menninger* (Ky. Ct. App. '10), 125 S. W. 256.

Sec. 893. Whether employed as a broker and authorized to do the acts claimed.

It is for the jury to determine whether plaintiff was employed as a broker and authorized to perform the acts for which he claims compensation; in case of a conflict of testimony it is error for the court to direct a verdict. *Stephens v. Bailey*, 149 Ala. 256; 42 S. 740; *Ryan v. Page*, 123 Iowa, 246, 98 N. W. 768; *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793; *Codd v. Seitz*, 94 Mich. 191, 53 N. W. 1057; *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116; *Cody v. Dempsey*, 83 N. Y. S. 899, 86 App. Div. 335; *Reddin v. Dam*, 64 N. Y. S. 611, 51 App. Div. 636; *Moore v. Boehm*, 26 N. Y. S. 67, 6 Misc. 38; *Tieck v. McKenna*, 101 N. Y. S. 317, 115 App. Div. 701; *Black v. Snook*, 204 Pa. St. 119, 53 A. 648; *Dixon v. Daub*, 17 Pa. Super. Ct. 168; *Center v. Conglomerate Min. Co.*, 23 Utah, 165, 64 P. 362.

Sec. 894. The question of the authority of principal's agent to employ a broker.

The authority of the principal's agent, in this case his father, to employ a broker is a question of fact that should have been submitted to the jury. *Phillips v. Hazen*, 122 Iowa, 475, 98 N. W. 305; *Codd v. Seitz*, 94 Mich. 191, 53 N. W. 1057; *Groscup v. Downey*, 105 Md. 273, 65 A. 930.

Sec. 895. Question of ratification.

Questions involving ratification should be submitted to the jury. *Center v. Conglomerate Min. Co.*, 23 Utah, 165, 64 P. 362.

Sec. 896. Whether the broker was the procuring cause of the transaction.

Whether the broker was in fact the procuring cause of the transaction entered into by the principal with the customer is properly left to the jury to determine. *Smith v. Anderson*, 2. Ida. (Harb.), 537, 21 P. 412; *Colvin & Rinard v. Lyons*, 96 P. 572, 15 Idaho, 180; *Rounds v. Alle*, 116 Iowa, 345, 89 N. W. 1098; *Reid v. McNerny*, 128 Iowa, 350, 103 N. W. 1001; *Rothemberger v. Schoninger*, 30 Ky. L. R. 1018, 99 S. W. 1150; *Hosmer v. Fuller*, 168 Mass. 274, 47 N. E. 94; *Kinder v. Pope*, 106 Mo. App. 506, 80 S. W. 315; *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116; *Smith v. McGovern*, 65 N. Y. 574; *Palmer v. Durand*, 70 N. Y. S. 1105, 62 App. Div. 467; *Reddin v. Dam*, 64 N. Y. S. 611, 51 App. Div. 636; *Condict v. Cowdrey*, 19 N. Y. S. 699, 61 N. Y. Super. Ct. 315; *Smith v. Smith*, 1 Sweeney (N. Y.), 552; *Bickert v. Hoffman*, 19 N. Y. S. 472; *Bonwell v. Howes*, 1 N. Y. S. 435; *Shipman v. Frech*, 1 N. Y. S. 67; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618; *Van Tobel v. Stetson, etc., Mill Co.*, 32 Wash. 683, 73 P. 788; *Wiley v. Rutherford*, 108 Wis. 35, 84 N. W. 14; *Burden v. Briquilet*, 125 Wis. 341, 104 N. W. 83; *Goldsmith v. Coxe*, 80 S. C. 341, 61 S. E. 555; *Murray v. Curry*, 7 C. & P. (Eng.) 584, 32 Exch. 771; *Jemoney v. Tallman*, 40 N. Y. Super. Ct. 436; *McLaughlin v. Campbell* (N. J. Err. & App. '09), 74 A. 530.

Sec. 897. Whether the contract given to the broker was exclusive.

In an action to recover commissions for a sale of real estate, plaintiff alleged a contract whereby defendant agreed to pay him a certain sum if he would find a purchaser for his property, and that he did so; defendant alleged that plaintiff had not the exclusive right to dispose of the property under the agreement, and that defendant had sold it himself. *Held*, to present a question of fact for the jury. *Black v. Snook*, 204 Pa. St. 119, 53 A. 648; *Rothemberger v. Schoninger*, 30 Ky. L.

R. 1018, 99 S. W. 1150. Where the authority is conferred on the agent by a written instrument its construction is for the court. *Grosscup v. Downey*, 105 Md. 273, 65 A. 930.

Sec. 898. Proper to take from jury when broker sold for less than instructions authorized.

A broker hired to sell property at a certain price, can not recover commissions for effecting a sale at a lower price, and the appellate court held that the case was properly taken from the jury. *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227. See also Sec. 408.

Sec. 899. Whether agent procuring mortgage with wrong description was guilty of negligence.

In an action by a principal against her agent for negligence in procuring a mortgage to be executed in her favor in which the land was wrongly described. *Held*, that it should be left to the jury to say whether the plaintiff was guilty of contributory negligence in not discovering the mistake, which was patent upon the face of the mortgage. *Munford v. Müller*, 7 Ill. App. 62. See also Sec. 913.

Sec. 900. Where the rate of compensation is not fixed a question for the jury.

Where an agent has been employed to sell land at no fixed rate of compensation, the jury are to fix the value of his services in the premises from the work done; and in fixing the amount, the rate usually paid professional land brokers for such services may be taken into consideration. *Ruckman v. Bergholz*, 38 N. J. L. 531; *Burdon v. Briquilet*, 125 Wis. 341, 104 N. W. 83.

Sec. 901. Where the claim of plaintiff to commissions is contested, has a right to go to the jury.

In an action to recover \$100 agreed to be paid for procuring a purchaser of certain property, plaintiff testified that defendant, to whom the owner of the property owed money, wished the property sold so as to get his money, and agreed to pay plaintiff \$100 if he found a purchaser, no price being

named; that plaintiff brought one L. to look at the property, but he refused to buy, when defendant asked \$5,000 for it; other parties afterward procured L. to purchase at \$2,700; plaintiff claimed that the sale was indirectly due to his efforts, and that the defendant had sold through other persons to keep from paying plaintiff; defendant testified that he had nothing to do with the sale after L. had refused to purchase at \$5,000, and that he agreed to pay plaintiff if he procured a purchaser at that price; the persons who finally made the sale testified that the plaintiff had nothing to do with the sale. *Held*, that plaintiff had a right to go to the jury on the evidence. *Kelso v. Woodruff*, 88 Mich. 290, 50 N. W. 249; *Monseau v. Dorsett*, 80 Ga. 566, 5 S. E. 780; *Ferguson v. Glaspie*, 38 Minn. 418, 38 N. W. 352; *Coolican v. Mil. & St. St. M. Ins. Co.*, 79 Wis. 471, 48 N. W. 717; *Dickinson v. Hahn* (S. D. Sup. '09), 119 N. W. 1034; *Mutchnick v. Friedman*, 120 N. Y. S. 375.

Sec. 902. Where agent procured purchaser and two-eighth interest unpurchasable, whether entitled to full commissions.

A real estate broker had found a purchaser at the price stipulated for land purported to be owned by his principal, and was then referred by him to other tenants in common, with whom he subsequently made terms at a higher price, except two-eighths interest owned by them, but did not disclose this to his first principal. *Held*, there was no duty owing by the agent as to the outstanding two-eighths, and it was not incumbent upon him to inform his principal, and in a suit by the broker for his commissions against his original principal, he was entitled to go to the jury upon the question of fulfillment of the terms of the original contract. *Black v. Barr*, 14 Pa. Super. Ct. 98, 651.

Sec. 903. Question of allowing interest on claim for commissions is for the jury.

The matter of allowing interest on a claim for commissions for producing a purchaser should be left to the discretion of the jury. *Schamberg v. Auxier*, 101 Ky. 292, 19 Ky. L. R. 548, 40 S. W. 911.

Sec. 904. Evidence of continuing offer, acceptance and performance by plaintiff.

In an action for services in selling an estate for the defendant, it appeared that the defendant told the plaintiff that he would give him a certain sum if he would obtain a purchaser, that the plaintiff, who was not a broker, neither did nor said anything at the time to show that he accepted the offer, but within a few days told J. S. that the defendant wanted to sell, and took him to see defendant, but did not find the defendant; and that afterwards J. S. bought the estate, but the defendant did not know till after the sale that the plaintiff had done anything to aid it. *Held*, that there was evidence for the jury of a continuing offer, of an acceptance and of a performance by the plaintiff of the contract thus formed. *Bornstein v. Lane*, 104 Mass. 214.

Sec. 905. Whether the attorney in fact executed and delivered a certain paper to the broker.

In an action by a broker for the recovery of commissions earned in procuring an exchange of real property, evidence held to require submission to the jury of the question whether the attorney in fact of the owner executed a certain paper and delivered it to the broker with the intention of authorizing him to negotiate the transaction. *Cody v. Dempsey*, 83 N. Y. S. 899, 86 App. Div. 335.

Sec. 906. In conflicting testimony as to a contract, the meaning thereof for the jury.

In an action to recover a broker's commissions for a sale of real estate, the contract provided that on a sale the broker should be entitled to a commission of \$150 "if title is taken," there was evidence that the broker procured a contract for the purchase of the property at a price satisfactory to defendants; the purchaser did not take title, and the defendant urged the fact as a defense; the broker testified that at the time of his employment the defendant had not then acquired title, and that the clause "if title is taken" referred to the conveyance to the defendant by the prior owners. *Held*, that the question of the meaning of the contract was for the jury. *Thill v.*

Schonzeit, 93 N. Y. S. 383, 104 App. Div. 151; *Condict v. Cowdrey*, 123 N. Y. 463, 25 N. E. 946; *Lechnyr v. Germansky*, 113 N. Y. S. 969; *Weaver v. Richards*, 156 Mich. 320. See Sec. 1131.

Sec. 906a. Question as to modification of contract for the jury.

In an action to recover commissions for selling real estate, where it appears that the commissions were to be paid as certain installments of the purchase money were received, the case is for the jury, where the evidence, although contradictory, tends to show that after certain installments had been paid, the original contract between the seller and the purchaser had not been abrogated, but had been modified, and in the modified form had been executed. *Papagian v. Scott*, 37 Pa. Super. Ct. 560.

Sec. 907. Whether broker did not act merely as sub-agent.

In an action by a real estate broker for his commissions in securing a purchaser, evidence examined and held to require submission to the jury of the question whether the broker did not act merely as sub-agent of other brokers. *J. B. Watkin's Ld. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72.

Sec. 908. Error to direct verdict for defendant because husband did not join, should have been left to the jury.

In an action by a real estate broker to recover compensation for furnishing a purchaser for defendant's land, where a part of the consideration to be paid was an exchange of homestead property owned by the customer, it was error to direct a verdict for defendant, on the ground that the contract could not be specifically enforced, for the reason that the husband did not join in the contract with the wife, who owned the land, nor in the offer to convey, where there was evidence tending to show that they both executed the contract as well as the deed offered in performance, and that they were ready and willing to perform, since such question should have been submitted to the jury. *Hamill v. Baumhover*, 110 Iowa, 369, 81 N. W. 600.

Sec. 909. Which of rival brokers effected a loan.

Plaintiff, a broker, called on one of a committee of two appointed by a corporation to secure a loan for it, and stated

that the loan could be obtained from a certain company, and that he had spoken to the company, and would expect a commission if defendant made the loan; the committee said that if another broker did not succeed by the next day, they would be glad to have plaintiff make the commission; on the next day, the committeeman told plaintiff that the other broker was unable to procure the loan, and plaintiff again stated the company of which he had spoken; the committeeman stated that he wished information as to the matter of taxes, and plaintiff introduced to him a person who gave the desired information; said committeeman was in constant communication with his colleague, and testified that he communicated to him all matters of interest in regard to the loan; the loan was finally obtained from the company suggested by plaintiff. *Held*, that plaintiff's right to a commission was a question for the jury. *Rogers v. Evan. Bro. Ben. & Mis. Co.*, 168 Mass. 592, 47 N. E. 434; *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412.

Sec. 910. Error to submit to jury where broker carried on no negotiations with the purchaser.

Where, in an action by the assignee of a broker to recover commissions for a sale of real estate, plaintiff's assignor testified that he was acting for the purchaser when he approached defendant, and that, on the failure of these negotiations, he mentioned other prospective purchasers, but told defendant that they were his customers, and it was shown that plaintiff's assignor carried on no negotiations with the party who purchased the property, and did not meet the party until a week after the sale, it was error to submit the case to the jury. *Whiteley v. Terry*, 82 N. Y. S. 89, 83 App. Div. 197.

Sec. 911. Whether failure to consummate sale was the fault of the principal.

In an action by a broker for his commissions for securing a purchaser, evidence examined and held sufficient to take to the jury the question whether the failure of the consummation of the sale was owing to the default of the principal. *Seidman v. Ranner*, 99 N. Y. S. 862, 51 Misc. 10.

Sec. 912. Whether the sub-agent concealed his relation from the owner.

In an action by a real estate agent for commissions, the owner testified that when the agent's sub-agent introduced a purchaser, the latter stated he wished to deal direct with the owner, who then stated a less price than fixed in the contract of employment; the owner testified that the sub-agent and the purchaser stated that they had made no arrangement with the agent; that the sub-agent stated nothing about commissions to the agent; and that he (the owner) told the purchaser and sub-agent that, if the agent had sold the land, he would have to let it go; the sub-agent testified that he asked the owner if the latter would not have trouble with the agent about the commissions, to which the owner replied that he would not, as he was selling the farm; the sub-agent testified that he told the owner he did not charge any commission, as he would get that from the agent; the purchaser substantiated the sub-agent's testimony; there was no evidence to show that the owner knew that the sub-agent was acting for the agent. *Held*, that the question whether the sub-agent concealed such fact from the owner should have been submitted to the jury. *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790.

Sec. 912a. Whether the broker was acting for opposite party a question for the jury.

The issue as to whether the broker was acting for the opposite party should be submitted to the jury. *Summa v. Dere-skiawicz* (Conn. Sup. '09), 74 A. 906.

Sec. 913. Whether alleged negligence of broker prevented a sale.

In an action to recover commissions for a sale of land, where the evidence shows that the intended purchaser was able, ready and willing to perform, but defendant claims that plaintiff prevented the fulfillment of the agreement by defendant within the time specified in the contract, the question whether the negligence of plaintiff was the cause of defendant's failure to perform is for the jury. *Stauff v. Bingenheimer*, 94 Minn. 309, 102 N. W. 694. See also Sec. 899.

Sec. 914. Whether broker knew of minor's interest which caused failure of sale.

In a suit between a broker and his principal involving the broker's right to a commission, whether the broker had knowledge of the minor's interest, which caused the failure of the sale, before he obtained a purchaser. *Held*, a question of fact for the jury. *O'Neill v. Printz*, 115 Mo. App. 215, 91 S. W. 174.

Sec. 915. Whether broker acted in good faith a question for the jury.

In an action by a broker for commissions for selling defendant's real estate. *Held*, that whether the plaintiff was acting in good faith for defendant's interest was a question for the jury. *Roome v. Robinson*, 90 N. Y. S. 1055, 99 App. Div. 143; *Lichtenstein v. Mott*, 91 N. Y. S. 57, 90 App. Div. 570; *Lienwen v. Kline* (Iowa '09), 120 N. W. 312.

Sec. 916. The terms of the agreement with the broker to procure a loan.

In an action for commissions for securing a loan, where the evidence for plaintiff, though contradicted by defendant, tends to show an agreement to pay one per cent. on the amount of the loan to be secured by plaintiff, the question as to such agreement is for the jury. *Carter v. Moss*, 210 Pa. 612, 60 A. 310.

Sec. 917. Where sale was made to customer after withdrawal from broker, it was error to submit to jury.

In an action for commissions on a sale of real property, it appeared that the purchaser had been informed that defendant's property was for sale, and had written defendant, before he met plaintiff or saw his advertisement; that the letter was referred to plaintiff with whom the property was listed and he and the purchaser examined the property and had some conversation about it, but agreed on nothing; that defendant then wrote plaintiff, "I desire to withdraw my property from the market for a period; I do not know yet how long;" that plaintiff had never been authorized to sell the property for less than \$5,400 net; that the purchaser conferred with defendant

afterwards and bought it for \$5,250. *Held*, that the evidence did not entitle plaintiff to go to the jury. *Malonee v. Young*, 119 N. C. 549, 26 S. E. 141. Compare *Hill v. Wheeler*, 2 Ga. App. 349, 58 S. E. 502.

Sec. 918. Where defendant promised plaintiff additional compensation if found satisfactory.

In a suit to recover the reasonable value of services in effecting an exchange of real estate, when the defendant set up that plaintiff had agreed to accept \$500 for his services, but there was evidence tending to show that as an inducement for such agreement, defendant promised to pay plaintiff a further reasonable commission if he found the land satisfactory, it was proper to submit such issue to the jury. *Blair v. Slosson*, 27 Tex. Civ. App. 403, 66 S. W. 112.

Sec. 919. Whether time for performance has been waived or contract continued.

Whether there is evidence that the time given a real estate broker to procure a purchaser has been waived, or the contract has been continued, is for the jury. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899; *Arents v. Casselman* (Va. Sup. '10), 66 S. E. 820.

Sec. 920. Whether plaintiff attempted to mislead defendant.

In an action to recover a commission for services in bringing about an exchange of land. *Held*, whether plaintiff attempted to mislead defendant upon a material matter connected with the transaction was for the jury. *Featherston v. Trone*, 82 Ark. 381, 102 S. W. 196; *Farris v. Gilder* (Tex. Civ. App. '09), 115 S. W. 645.

Sec. 920a. Question as to whether defendant's defense was an afterthought was for the jury.

Where, in an action by an assignee of a contract for the sale of land, made through a broker, against the principal for breach of the contract, the defense was that the contract had been procured through misrepresentations, the question as to how far a delay of a few weeks on defendant's part in retaining

the purchase money, and her reading of the whole or part only of the paper before signing it, tended to show her defense to be an afterthought, were for the jury. *Kurinsky v. Lynch*, 201 Mass. 28, 87 N. E. 70.

Sec. 921. Whether the owner acted in good faith in himself selling the property.

On the trial of an action by real estate agents for commissions on a sale of property, it was error to award a non-suit, where the evidence showed that plaintiffs had defendant's property in their hands to sell on specific terms, and that, pending negotiations between the agents and their customers, they were prevented from selling by the act of their principal in taking the matter into his own hands, and, without notice, selling the property at a lower price to a customer procured by their efforts, as, in such case, the good faith of the parties, as well as whether the purchaser would have given the stipulated price, are questions of fact for the jury. *Hill v. Wheeler*, 2 Ga. 349, 58 S. E. 502. Compare Sec. 917.

Sec. 922. Whether a limitation of time was placed upon the contract.

An owner agreed to pay a broker a specific commission on his procuring a purchaser of real estate; at a subsequent interview on the same day, when the prospective purchaser was urged to conclude the purchase he insisted on having more time; the owner claiming that he expected another purchaser, said he would give the prospective purchaser a week's time within which to make up his mind. *Held*, that whether the owner placed a limitation on the contract with the broker to procure a purchaser was for the jury. *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509.

Sec. 922a. Question as to authority of agent is for the jury.

While the question of the authority of an agent is for the jury, when that is disputed, the court should declare whether a given act is in excess of the agent's authority, so that, in an action for commissions for purchasing land for defendant, the court properly instructed that any payments made by plain-

tiff to the sellers, in excess of the amount limited by defendant, was without authority. *Mahon v. Rankin* (Or. Sup. '09), 102 P. 608.

Sec. 923. Whether negotiations were abandoned and sale resulted from new.

Evidence held sufficient to warrant submitting to the jury the question whether the negotiations through plaintiff were abandoned and the sale ultimately made to the purchaser introduced by him was the result of entirely new negotiations. *Walker v. Baldwin*, 106 Md. 619, 68 A. 25.

Sec. 924. Whether the contract with broker was rescinded.

In an action to recover compensation under a contract for commissions to be paid plaintiff for selling defendant's land, whether or not the contract was mutually rescinded was for the jury. *Larson v. Lorer* (Wash. Sup. '08), 94 P. 109.

Sec. 925. Whether defendant purchased the property, though the deed was taken in name of wife.

Evidence that defendant purchased the land and so was liable for the services of plaintiff, to be paid for if defendant made the purchase. *Held*, sufficient to go to the jury, though the contract of purchase and the deed were taken in the name of defendant's wife. *Bloch v. Lowe*, 99 N. Y. S. 951, 51 Misc. 8.

Sec. 925a. Evidence warranted submission to jury on question whether plaintiff was a joint purchaser.

In an action by a land broker for commissions, evidence held to warrant submission to the jury whether plaintiff was a joint purchaser. *Smith v. Fears* (Tex. C. A. '09), 122 S. W. 433.

Sec. 926. What is a reasonable time to find a purchaser.

A broker employed by the owner to find a purchaser without any specification of time, has a reasonable time, which is for the jury to determine. *Hurst v. Williams*, 31 Ky. L. R. 658, 102 S. W. 1176; *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509. See also Secs. 611, 612.

Sec. 927. Whether compensation for collecting rents covered all of broker's services.

Where, in an action for the services of a real estate agent in procuring defendant a tenant for her hotel, plaintiff claimed that his services were reasonably worth five per cent. of the rent for the term, evidence that defendant paid plaintiff five per cent. on the installments of rent was sufficient to require the submission to the jury of the question whether the same was paid in full compensation for plaintiff's services, or a recognition that plaintiff was entitled to five per cent. of all the rents collected. *Collopy v. Schuman*, 70 A. 190, 75 N. J. L. 97.

Sec. 928. Whether an owner dealing with a customer of another broker became liable to latter.

Whether an owner employing several brokers to procure a purchaser dealt with knowledge of the facts through one broker with a customer procured by another broker, and thereby became liable to the latter for the commissions. *Held*, under the facts, for the jury. *Jennings v. Trummer*, 52 Oregon, 149, 96 P. 874.

Sec. 929. Whether the person with whom the owner contracted was an agent of the broker.

In an action for commissions for procuring a purchaser for land pursuant to a contract between the alleged agent of the broker and the owner of the land, whether the person with whom the owner contracted was the agent of the brokers for listing the land in question. *Held*, under the evidence, a question for the jury. *Ewing v. Lunn* (S. D. Sup. '08), 115 N. W. 527.

Sec. 929a. Improper to submit a question of law to the jury.

Questions of ultimate fact only are to be submitted to the jury; the question under consideration is double. Whether a contract was entered into between the plaintiff and defendant is a mixed question of law and fact, and questions of law should never be submitted to a jury. *Kilpatrick v. McLaughlin*, 108 Ill. App. 463.

Sec. 929b. Meeting of minds on contract of sale.

Plaintiff, after negotiating for sale to S. of timber land, on which defendant had an option, in which S.'s only offer was \$90,000 for such timber and that of certain other adjoining tracts, which offer defendant rejected, had a telephone talk with defendant, in which he said that he thought S. would give \$90,000 for the timber under option, and defendant told him to sell if S. would do so. Plaintiff agreed to see S., and report to defendant by telephone. Later in the day plaintiff telegraphed defendant: "S. will give \$90,000 for timber, including the additional tracts * * * can't raise him a penny." Defendant then telegraphed plaintiff: "We accept S.'s offer; if he declines to stand up, we can do no more business with him." *Held*, that there was evidence to go to the jury that defendant's telegram was in reply to plaintiff's telegram, and not to the telephone offer, and that therefore there was a meeting of minds on the contract entitling plaintiff to commissions. *Watson v. Paschall*, 83 S. C. 366, 65 S. E. 337.

CHAPTER XVI.

INSTRUCTIONS TO JURIES.

Sec. 930. Instructions must not assume as proved, matters which are in issue.

Instructions must not assume as proved, matters which are in issue in the case. *Swigert v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Cassady v. Carrahan*, 119 Iowa, 500, 93 N. W. 386; *Richardson v. Hoyt*, 60 Iowa, 68, 14 N. W. 122; *Benedict v. Pell*, 74 N. Y. S. 1085, 70 App. Div. 40; *Gerding v. Haskin*, 21 N. Y. S. 636, 2 Misc. 172; *Graves v. Dill*, 159 Mass. 74 34 N. E. 336.

Sec. 931. That defendant was liable where compensation for services was expected.

It was proper to instruct the jury that defendants were liable for the value of plaintiff's services, if they were of such a character and rendered under such circumstances as would indicate to a reasonably intelligent business man that they were not performed gratuitously, and that compensation was expected, the instruction not assuming that plaintiff had rendered all the services for which he asked compensation. *Miller v. Early*, 22 Ky. L. R. 825, 58 S. W. 789. See also Sec. 956a.

Sec. 932. Instructions must conform to the evidence in the case.

Instructions must be in conformity with the evidence adduced in the case, and instructions which impliedly assume the existence of evidence which was not given are erroneous. *Leech v. Clemons*, 14 Colo. App. 45, 59 P. 230; *Davis v. Morgan*, 96 Ga. 518, 23 S. E. 417; *Carnes v. Howard*, 180 Mass. 569, 63 N. E. 122; *Cadigan v. Crabtree*, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77; *Hughes v. McCullough*, 39 Ore. 372, 65 P. 85; *Taylor v. Cox* (Tex. Supreme '91), 16 S. W. 1063; *Lawson v. Thomp-*

son, 10 Utah, 462, 37 P. 732. Instruction not objectionable as submitting an issue not pleaded. *Baldwin v. Smith* (Tex. Civ. App. '09), 119 S. W. 111.

Sec. 933. Defendant sued by broker entitled to instruction which assumes he acted as such.

A defendant sued by a broker for commissions is entitled to an instruction which assumes plaintiff to have acted as broker, where the declaration alleged that defendant agreed to pay plaintiff a fixed sum if plaintiff, as a "broker," would secure a sale to defendant, and plaintiff testified that he acted as a broker. *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479.

Sec. 934. An instruction should be given, on request, that broker must have been the procuring cause of sale.

An instruction that the broker must have been the procuring cause of the sale, in order to entitle him to a commission, should be given on request, where that point is in issue. *Hinds v. McIntyre*, 89 Ill. App. 611; *Munson v. Carlstrom* (Iowa Sup. '09), 119 N. W. 606.

Sec. 934a. Error to charge that if plaintiff was procuring cause of sale he was entitled to recover commissions.

A broker sued to recover commissions for selling defendant's real estate, and testified that during defendant's absence he exhibited the premises to one who, after defendant's return, purchased for \$2,700; defendant testified that it was agreed that the broker was to receive no commission unless he sold for \$3,000 during defendant's absence. *Held*, that it was error, under the evidence, to charge that if the plaintiff was the procuring cause of the sale he was entitled to recover. *Largeant v. Story* (Tex. Civ. App. '01), 61 S. W. 977.

Sec. 934b. Instructions erroneous for omitting that plaintiff should be found to be the procuring cause of the sale.

Real estate brokers, in their complaint for compensation, alleged that defendant gave them the exclusive agency to sell a certain tract of land, their compensation to be a percentage on the price obtained, and that they procured a purchaser

to whom defendant sold. Defendant pleaded a general denial, and especially, that plaintiffs' agency, if any, was revoked before they began to negotiate with the purchaser. *Held*, that an instruction that if plaintiffs had an exclusive agency when they began to negotiate with the purchaser, they were entitled to recover, was erroneous, as not including the necessity that they should have been the procuring cause of the sale, thereby failing to conform to the issues made, and even had plaintiffs alleged that defendant, by his sale, had prevented plaintiffs from consummating their sale, the omission would still have been fatal to the instruction. *Jackson v. Stephenson* (Tex. Civ. App. '08), 114 S. W. 848; *Russell v. Poor* (Mo. App. '08), 119 S. W. 433.

Sec. 935. Instruction that broker should bring buyer and seller together and effect a purchase.

Where no other instruction defining a broker's duty is given, it is error to refuse an instruction that the duty of a broker is to bring the buyer and seller together and effect a purchase of the property according to the terms agreed on by the seller and the broker, and that the latter is not entitled to a commission for an unsuccessful effort to effect a sale. *West v. Demme*, 128 Mich. 11, 87 N. W. 95. Compare Sec. 511.

Sec. 936. Where instructions cover case generally. failure as to particular detail not error.

If the instructions cover the case generally, the failure to instruct concerning particular details is not error, in the absence of a request to specifically charge on that point. *Bickart v. Hoffman*, 19 N. Y. S. 472; *Keyser v. Reilly*, 191 Pa. St. 271, 43 A. 317, 44 Weekly Not. Cas. 240.

Sec. 937. Court not bound to use the identical language, if substantially the same it is sufficient.

The court is not required to use the same language in which the charge offered is expressed; it is sufficient if the instruction given is essentially similar to that requested. *Walker v. Rogers*, 24 Md. 237.

Sec. 938. Employing the word "furnished" instead of "procured" not a departure.

Where defendant agreed to pay commissions for sales of land to customers "procured" by plaintiff, an instruction that defendants were liable if plaintiffs "furnished" customers, is not a departure from the issues made. *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120.

Sec. 939. Where evidence on given fact is undisputed, the court should so instruct.

Where the evidence on a given fact is undisputed the court should so instruct the jury. *O'Callahan v. Boeing*, 72 Mich. 669, 40 N. W. 843.

Sec. 940. Instructions are to be considered as a whole, and unimportant defects are not fatal.

Instructions are to be considered as a whole, and if they are correct and sufficient, defects in unimportant particulars are not necessarily fatal. *Blake v. Stump*, 73 Md. 160, 20 A. 788, 10 L. R. A. 103; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *Walton v. Cheesebrough*, 167 N. Y. 606, 60 N. E. 1121; *Bickart v. Hoffman*, 19 N. Y. S. 472; *Wilson v. Nuber* (Tex. Civ. App. '02), 68 S. W. 800.

Sec. 941. Instruction proper as to burden of proving a particular fact in issue.

It is proper to instruct as to who bears the burden of proof and an instruction that conduct which imputes bad faith upon the part of an agent to sell real estate must be shown by the party claiming it, is proper. *Buckingham v. Harris*, 10 Colo. 455, 15 P. 817; *Harrison v. Pusterska*, 97 Iowa, 166, 66 N. W. 93.

Sec. 942. Instruction erroneous that burden is on party to prove a fact not denied

In charging the jury it is error to place the burden on a party to prove facts which are not denied. *Anderson v. Bradford*, 102 Mo. App. 433, 76 S. W. 726.

Sec. 943. Instruction properly refused, as too broad.

Where plaintiff averred that he was to have all proceeds of sales over the net price and defendant denied this, and counter-claimed that plaintiff agreed to sell the lots for one dollar per front foot; that plaintiff had paid himself all he had earned out of the proceeds collected and owed a certain balance of such proceeds to defendant. *Held*, that a charge that plaintiff had the burden of showing that he had agreed for larger pay than one dollar per front foot or was entitled to any excess was too broad. *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175.

Sec. 944. Error to leave compliance with contract to jury, that being a question of law.

In an action by a broker to recover commissions for a sale of land, an instruction leaving it to the jury to determine whether the plaintiff had complied with his contract so as to entitle him to recover commissions was error, that being a question of law for the court, the contract being in writing. *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22.

Sec. 945. Error to instruct that broker was entitled to commissions on finding purchaser, when principal's approval was necessary.

Where a contract of sale was to be approved by the owner, an instruction that plaintiff was entitled to commissions if he found a purchaser, though defendant refused to carry out the trade, was erroneous. *Gean v. Hess*, 102 Iowa, 140, 71 N. W. 218.

Sec. 946. Instruction based upon wrong hypothesis is erroneous.

In an action by a broker for commissions lost, the plaintiff alleged that defendant gave plaintiff the exclusive right to sell the property for \$3,000, defendant reserving only the right to sell the property himself for not less than that sum; that plaintiff procured a purchaser, who was ready and able to purchase for that sum, but that defendant previously sold the property for \$2,500; defendant admitted the contract, except that he bound himself not to sell for less than \$3,000, which he denied, and admitted that he sold the land as alleged. *Held*,

that an instruction that if there was a contract between the parties by which plaintiff procured a purchaser, "defendant not having sold the land," then plaintiff would be entitled to recover, was erroneous, as based on the hypothesis that defendant had not sold the land, which was not in issue, defendant having admitted that he sold the land; the instruction thereby practically amounted to directing a verdict for the defendant. *Hughes v. McCullough*, 39 Ore. 372, 65 P. 85; *Will v. Schwartz* (Tex. Civ. App. '09), 120 S. W. 1039.

Sec. 947. Instruction held erroneous that placed undue stress upon payment as indicating the principal.

On the question as to whether W. acted as agent for plaintiff or defendant, a charge that, in this connection the jury should consider from whom W. got his pay, whom he asked to pay him, and the fact that W. had authority to sell the lot in question, is erroneous, as giving undue prominence to the fact as to who paid for the service, and allowing the jury to infer previous authority to sell from the fact of payment for services in selling. *Williamson v. Tyson*, 105 Ala. 644, 17 S. 336.

Sec. 948. Instruction that, if by the terms of the contract, the broker had nothing to do, there was no consideration for the promise, is proper.

In an action for real estate commissions, defendant is entitled to an instruction that if, by the terms of the contract, it is shown that there was nothing for the brokers to do, then the promise to pay them commissions was without consideration and void. *Wolff v. Denboskey*, 74 N. Y. S. 565, 66 App. Div. 428, 36 Misc. 643.

Sec. 949. An instruction is objectionable if jury not directed that belief must rest on evidence.

An instruction is objectionable if the jury are not directed that their belief must be based on the evidence. *Champion Iron Fence Co. v. Bradley*, 10 Ill. App. 328. See also Sec. 1038.

Sec. 950. Instruction that plaintiff was entitled to recover \$1,000, erroneous, where nothing to show brokers got it.

In assumpsit by a principal against real estate brokers for money had and received, an instruction that if the brokers

sold the principal's farm for \$11,000, but accounted to him only for \$10,000, the principal is entitled to receive \$1,000, is erroneous, where there is evidence that the purchaser, with the principal's knowledge, bought from one who had a prior option on the land, and there is no evidence that the defendants ever received the \$1,000. *Henshaw v. Wilson*, 46 Ill. App. 364.

Sec. 951. Instruction properly refused which contemplated that no leases were made except through brokers.

In an action to recover brokerage for effecting a lease of real property, plaintiff did not allege that he had been employed by defendant, but alleged that defendant accepted plaintiff's services with knowledge that they had been rendered. *Held*, that it was proper to refuse plaintiff's request to charge that, while the owner was entitled to know that the brokers had been instrumental in sending a tenant, yet, when he knows that the tenant had received information of his intention to let and his price, the owner is bound to inquire where the tenant got the information, as such instruction presupposes that leases are never made without the intervention of brokers, and that no information could be received as to what property was to be let, except through brokers. *Tinkham v. Knox*, 21 N. Y. S. 954, 2 Misc. 579.

Sec. 952. Instruction that plaintiffs could not recover unless they secured a purchaser at price stated, erroneous.

In an action by real estate agents to recover commissions, it was error to instruct the jury that, if defendant agreed to give plaintiffs a particular sum in case they sold his farm at a specified price, plaintiffs could not recover unless they sold or procured a purchaser for the property at the price specified, defendant having sold the property to the purchaser procured by plaintiffs, for a price less than that specified, and to that extent availed himself of plaintiff's exertions. *Wetzell v. Wagoner*, 41 Mo. App. 509.

Sec. 953. Instruction that bringing parties together is not enough, unless efficient cause of sale, is incorrect.

In an action by a broker to recover commissions, a charge that, "merely to bring the buyer and seller together is insuffi-

cient to entitle an agent to a commission, unless it is the efficient cause of the sale," is incorrect, and properly refused. *Bowser v. Field* (Tex. Civ. App. '91), 17 S. W. 45.

Sec. 953a. Error in charge omitting that broker must be the procuring cause of the sale.

The error in an instruction given at the instance of plaintiff, in an action for commissions for procuring a purchaser of real estate, authorizing a recovery on a finding that plaintiff was employed to procure a purchaser, and introduced a customer to whom a sale was subsequently made, arising from the failure to require a finding that the broker was the procuring cause of the sale, was not cured by a charge, given at the instance of the defendant, that before judgment could be rendered for plaintiff, he must show that through his services one was induced to purchase the property, since the two instructions were contradictory. *Russell v. Poor* (Mo. App. '08), 119 S. W. 433.

Sec. 954. Instruction to find for broker, if found to be the procuring cause of sale, is correct.

An instruction to find for the broker, if it was through the efforts and information given by him that the owner and the purchaser were brought together as seller and buyer, given in connection with a charge that the broker was entitled to commissions if he afterwards became the procuring cause of such sale, stated the correct law of the case. *Bowser v. Field* (Tex. C. A. '91), 17 S. W. 45.

Sec. 954a. Improper modification of charge asked for by defendant.

In an action by real estate brokers for commissions a request to charge that plaintiffs could not recover if the prospective purchasers had, in fact, and in good faith, abandoned their negotiations for the purchase through plaintiffs before the matter was taken up with the purchasers by another person, was improperly modified by adding a further condition to the defeat of plaintiffs' recovery, that plaintiffs had led defendants, through their attorney, to believe that plaintiffs had

abandoned all efforts to make a sale, and had abandoned the idea of association with the transaction any further; since, to warrant a recovery for plaintiffs their services must have been the efficient cause of the sale, regardless of their abandonment of the transaction, and defendants, as well as plaintiffs, could be the moving party in the cancellation of the agency. *Young v. Hubbard*, 154 Mich. 218, 15 D. L. N. 725, 117 N. W. 632.

Sec. 955. Instruction that if broker found a purchaser for property on terms stated, entitled to commissions, proper.

A real estate agent sued on a contract for commissions for a sale of land; the contract was made a part of the complaint, but was not introduced in evidence: the court charged that as plaintiff had undertaken to effect a sale or procure a purchaser, in accordance with the contract, it was necessary for him to prove that he had found a purchaser who was willing to take the property on the terms provided in the contract. *Held*, that as the charge, when referring to the complaint, was clearly correct, and the court had evidently given it under the impression that the contract was in evidence, plaintiff could not be heard to object. *Hegman v. Hood*, 3 Ind. App. 456, 29 N. E. 1141.

Sec. 956. Instruction premature, as jury should first find that agent was authorized to act for principal.

In an action by a real estate broker to recover on a special contract for procuring a purchaser, the contract having been made by one alleged to be the agent of the owner, and the authority of the agent being one of the issues, the court properly refused an instruction stating that the plaintiff was entitled to recover if he was employed by the owner, or some one acting for her, without stating that such person must be authorized to so act. *Funk v. Latta*, 43 Neb. 739, 62 N. W. 65.

Sec. 956a. Charge in case of implied contract held correctly given.

In an action for commissions, it was admitted that defendant sold the property, and the court instructed that if plaintiff was a means of procuring a purchaser for the property,

and defendant agreed to pay a reasonable commission for his services, or permitted plaintiff to render services under circumstances which would lead a reasonably prudent man to believe that plaintiff expected compensation therefor, the jury should find for the plaintiff. *Held*, that the instruction properly submitted the question whether the defendant agreed to pay plaintiff for his services, or permitted him to render them under circumstances leading a reasonably prudent man to believe compensation was expected. *Bullock v. Menninger* (Ky. Ct. App. '10), 125 S. W. 256. See also Sec. 931.

Sec. 957. Instruction that if plaintiff performed some service though he did not sell, entitled to some compensation, proper.

In an action to recover for the value of services as agent in selling real estate, when there is testimony tending to show that the plaintiff rendered some service, but did not effect a sale, if the jury believed that he rendered some service, an instruction that he is entitled to recover on a *quantum meruit* is not improper. *McMurtry v. Madison*, 18 Neb. 291, 25 N. W. 85. (This is contrary to the general rule, that the agent stakes his efforts upon success, and if unsuccessful loses all.)

Sec. 958. Instruction is erroneous, that there is room for a verdict of no cause of action, where defendant admits broker performed services.

Where defendant admits that plaintiff was instrumental in effecting the sale, but disputes the value of the services, it is error to charge the jury that there is room for a verdict of no cause of action. *Scribner v. Hazeltine*, 79 Mich. 37, 44 N. W. 618.

Sec. 959. Instruction that if agreement was as claimed by defendant plaintiff entitled to verdict, improper.

Plaintiff having brought defendant and a purchaser together, a sale was effected by them for \$10,000; plaintiff claimed that he was authorized to sell for this amount and for a commission thereon, and after testifying to this agreement, he testified that just before and after defendant made the sale he told

plaintiff that he would make it satisfactory to him and pay him for his services; defendant's claim was that plaintiff was to receive as commissions only such sum as he should obtain in excess of \$10,000. *Held*, that there was nothing in the case which entitled plaintiff to an instruction that, if the agreement was, in the first place, as claimed by defendant, still plaintiff was entitled to a verdict if he consented to the sale for \$10,000, and the defendant thereupon renewed his promise to pay the commission. *Morehouse v. Remsen*, 59 Conn. 392, 22 A. 427.

Sec. 960. Instruction on contract, either joint or several, that defendant only liable for share, properly refused.

Where the evidence shows that defendant's contract to pay plaintiffs a certain commission for a sale of land, is either a joint contract with that of other owners of the land, or is an individual contract, the court properly refused to charge that defendant is only liable for his share of the commission to the extent of his individual interest; their liabilities can not be apportioned. *Mosseau v. La Roche's Sons*, 80 Ga. 568, 5 S. E. 780.

Sec. 961. Instruction that if jury find contract made and lots sold, plaintiff entitled to commissions, proper.

In an action for commissions on sales of lots, an instruction, after stating the respective claims of the parties, that if the jury find that the arrangement alleged by plaintiff was made and after that arrangement defendant's lots were sold plaintiff is entitled to recover the amount claimed by him as commissions, is proper, there being no question as to the price for which the lots were sold. *Ockenfells v. Moeller*, 79 Mich. 314, 44 N. W. 790.

Sec. 962. Instruction that broker should have exercised the greatest care, requires too high a degree of care.

In an action on notes defendant pleaded in reconvention that she had given plaintiff certain money to loan for her, but which, through his negligence, she had lost; the evidence tended to prove that plaintiff had received a commission from the borrower for making the loan. *Held*, an instruction that if plaintiff received a profit from the lending he was bound to use the

greatest degree of care that an ordinarily prudent person would exercise under like circumstances, was erroneous, as requiring too high a degree of care; plaintiff, as bailee or broker, being only required to exercise the care of an ordinarily prudent person. *Caruthers v. Ross* (Tex. Civ. App. '01), 63 S. W. 911.

Sec. 963. Instruction that it was incumbent on agent to show land worth the price error.

Plaintiff authorized defendant, who was a broker, to sell a tract of land, and to contract and advertise at plaintiff's expense; it was afterwards agreed that the advertisement should be discontinued, and plaintiff told defendant that if he got a piece of property to sell for which plaintiff could turn in his property as part payment he desired to know it; afterward defendant and others obtained an option on some land, and notified plaintiff, who, on being told of the price which defendant and his associates were to pay for it, purchased it, after examination, giving his land as part payment; later, plaintiff sued on the ground that defendant was his agent and liable to him for the profit. *Held*, that the business was in no sense confidential, and it was error to instruct that it was incumbent on defendant to show that when plaintiff purchased he had knowledge of all the facts, and that the land was worth what he paid for it. *Pomeroy v. Wimer*, 167 Ind. 440, 78 N. E. 233, 79 N. E. 446.

Sec. 964. Instruction that although agent could sell land at price fixed, did not excuse from selling at best price obtainable, proper.

In an action against brokers to recover money retained by them out of the purchase price, an instruction that though plaintiff gave defendants authority to sell his land for a specific sum per acre, such authority did not excuse the defendant from selling for the best obtainable price, was not erroneous, on the rule that it made the agent exceed the instructions of his principal, and made him liable if he did not. *Harri-son v. Lakeman*, 189 Mo. 581, 88 S. W. 53; *Lightenstein v. Mott*, 91 N. Y. S. 57, 99 App. Div. 570. See also Sec. 290.

Sec. 965. Instruction assuming from purchaser giving check to seller, who turned it over to broker, that latter received it from purchaser, proper.

Where, in an action to recover from brokers a portion of the purchase money retained by them for effecting a sale of plaintiff's land, the evidence showed that the purchaser gave his check to plaintiff, and he turned it over to defendants, who subsequently gave plaintiff their check, an instruction assuming that defendants received the money from the purchaser was not erroneous. *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53.

Sec. 966. Instruction that if broker misread contract to principal to deceive, not binding on him, proper.

Where a land owner sued his brokers, who had effected a sale, to recover a portion of the purchase money which had been retained by them, on the ground that the contract was not binding on him, because he had been fraudulently induced to enter into it by the act of the defendants in not correctly reading the contract to him, and also on the ground that the contract had been qualified by the alteration thereof by defendants, an instruction that if plaintiff signed the original contract, defendants in reading it to him having fraudulently deceived him, then the contract was not binding, was not erroneous, on the theory that the action was not one for the cancellation of a contract. *Id.*

Sec. 967. Instruction that contract was severable, and broker entitled to compensation for one deal, proper.

Evidence held conclusive that the contract by which appellant agreed to pay a commission of one dollar per acre for procuring contemplated exchanges of real estate for other property was not an entire but a severable contract; the respondent was entitled to his commissions upon effecting one of the contemplated trades, and the court did not err in so instructing the jury. *Goodspeed v. Miller*, 98 Minn. 457, 108 N. W. 817. See also Sec. 496.

Sec. 968. Instruction that propositions were substantially the same, erroneous, being by different brokers and different.

In an action by a real estate broker for commissions, it appeared that plaintiff obtained for defendant's property, valued at \$90,000, an offer consisting of an equity in certain apartment houses estimated at \$60,000, and an equity in certain dwelling houses estimated at \$30,000, which offer was declined; that plaintiff thereafter obtained from the same person an offer of an apartment house, and a mortgage for \$30,000 on the property to be taken from defendant, which was also declined; and that another broker, in ignorance of what plaintiff had done, subsequently obtained from the same person the offer of an equity in an apartment house estimated at \$15,000, and mortgages for \$85,000 on the property taken of defendant, which defendant accepted. *Held*, that the offer so accepted was substantially different from either of those submitted by plaintiff, and therefore an instruction, on the theory that they were substantially the same, was misleading. *Crowningshield v. Foster*, 169 Mass. 237, 47 N. E. 879.

Sec. 969. Instruction proper that if contract was altered before purchaser executed it, there was no meeting of minds.

Where a broker, in an action for services in procuring defendant a purchaser for land, claimed that both parties had signed duplicate contracts of sale, and defendant claimed that after signing the papers the purchaser took them and signed only after making material alterations therein, and that he thereupon refused to re-execute the contracts as altered, and that they were never delivered, it was error to refuse an instruction that if, after defendant executed the contracts, they were altered before the purchaser executed them, and were never subsequently re-executed, there was no meeting of minds. *Bruce v. Hurlbut*, 66 N. Y. S. 1127, 54 App. Div. 616; *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10. See also Sec. 996.

Sec. 970. Instruction erroneous that broker to find purchaser is entitled to commissions, though paid by purchaser.

Plaintiff was employed by defendant to find a purchaser for lands, and was also under an agreement with certain prospective purchasers by which he was to participate with them in

the advantages of the purchase if made; he induced these purchasers to inspect the lands, and on their objecting to the price, defendant, unknown to them, included the plaintiff's commissions from defendant, urging them to make the purchase, and finally induced them to agree to do so; afterwards, when they discovered the dual character of plaintiff's agency, they refused to consummate the contract and defendant refused to pay plaintiff commissions, whereupon he brought suit therefor. *Held*, that a charge that if defendant employed plaintiff to find a purchaser at a price which would be satisfactory to defendant and the purchaser, defendant could not defeat the action by proof that plaintiff was also to be paid for his services by the purchaser, was erroneous. *Green v. Southern States Lumber Co.*, 141 Ala. 680, 37 S. 670. See also Sec. 314.

Sec. 970a. Erroneous instruction to jury as to waiver.

Where the only testimony as to whether or not there was a modification of the agreement of defendant that plaintiff, a real estate agent, should have a commission if a trade of defendant's property was made with S., was defendant's testimony, contradicted by plaintiff, that after the first attempt at a trade had failed, he had a conversation with plaintiff, in which plaintiff said that S. would not trade, and that they would drop the deal, and that if defendant disposed of the property himself, or through another agent, he did not expect a commission; that he only expected one if he closed the deal himself; the only question for the jury was whether such conversation occurred, as, if it did, plaintiff would be presumed to have understood it, so that, the sale having been consummated by another agent, it was error to instruct that for defendant to escape liability to plaintiff he must show, not only that he understood plaintiff had waived his claim to a commission, but also that plaintiff understood that he was to waive such claim. *Romans v. Thew* (Iowa Sup. '09), 120 N. W. 629.

Sec. 971. Instruction properly refused that if property was brought to defendant's notice in advance of plaintiff's, latter not entitled to recover share of commissions.

Where, in an action by a real estate broker to recover from defendant one-half of the commissions received by the latter

on a sale of certain property for the sale of which the plaintiff was agent, the complaint alleged that plaintiff brought the property to defendant's notice, that the latter agreed to co-operate with plaintiff in the sale of the property, and in consideration of his bringing the same to defendant's notice and of his services, defendant agreed to pay plaintiff one-half of the commissions received on the sale of the property, the court properly refused to charge that if the premises in question were brought to defendant's notice prior to the plaintiff's bringing notice thereof to defendant, he could not recover on the contract. *Alden v. Robinson*, 98 N. Y. S. 675.

Sec. 972. Instruction to find for defendant error, where plaintiff shows he induced buyer to make offer accepted.

In an action for commissions for the sale of real estate, the only evidence introduced was by the plaintiff, which showed an employment to sell land at a fixed price; that the agent induced the purchaser to make an offer for it; that the offer was finally accepted upon a sale of the property at auction on the terms of the purchaser's offer to the agent; there was no notice of discharge from further services given; and the services were worth a certain sum, as fixed by the contract of employment, which was proved. *Held*, that the court erred in giving peremptory instructions at the close of plaintiff's testimony to find for the defendants. *West v. Prewitt*, 19 Ky. L. R. 1480, 43 S. W. 467; *Muskowitz v. Miller*, 113 N. Y. S. 1037.

Sec. 973. Instruction that plaintiff was entitled to recover if cause of sale error, where employment as agent is in issue.

Where the question whether a real estate broker was employed by the owner is in issue in an action for broker's commissions, and the evidence thereon is conflicting, it is error to instruct that the broker is entitled to recover, if he was the procuring cause of sale, for the commissions as claimed, as the instruction takes the question of employment from the jury. *Benedict v. Pell*, 74 N. Y. S. 1085, 70 App. Div. 40.

Sec. 974. Instruction that if contract sued on was different, plaintiff barred recovery error, is a question of law.

In an action by a broker to recover commissions for finding a purchaser for land, an instruction that if the contract sued

on differed from the contract made, plaintiff could not recover, was erroneous, as leaving a question of law to the jury. *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594.

Sec. 975. Instruction on defendant's right to terminate agency, "broker entitled to fruits of seed sown," error.

In an action by a broker to recover commissions for a sale of land, it appeared that some months after the authority to sell had been revoked for failure of the broker to procure a purchaser, the owners sold the land to one with whom the broker had attempted to negotiate a sale. *Held*, error to submit the cause to the jury to determine whether the plaintiff was the efficient cause in procuring the sale, and, on defendant's request, to charge that defendant had the right to terminate his employment at any time, if he did not within a reasonable time produce a purchaser, to reply: "I have already charged that, but that does not prevent him from being entitled to the fruits of the seed he had already sown." *Donovan v. Weed*, 182 N. Y. 43, 74 N. E. 563.

Sec. 975a. Erroneous instruction containing expression of opinion by the court on the weight of the evidence.

In an action by a broker for commissions, the issue was whether plaintiff had sent the purchaser to defendant, and there was evidence for defendant that plaintiff had told defendant that he did not know the purchaser. The court instructed the jury that, if they found any testimony to the contrary of plaintiff's assertion that he sent the purchaser to defendant, they were at liberty to find it, but if they could not, then they were bound to take the testimony as it stood, and that they were to examine the evidence and find wherein or whereby there was any testimony to the effect that the purchaser did not go to defendant's house under the direction of plaintiff, and, if they found any such testimony, to consider it, but if they found no such testimony that their duty was plain. *Held*, that the charge was erroneous as an expression of opinion by the court, that there was no testimony in the record contradictory to plaintiff's assertion that he sent the purchaser to defendant. *Barendsen v. Wilder* (Mich. Sup. '09), 122 N. W. 355, 16 D. L. N. 529.

Sec. 976. Instruction proper that broker could not recover unless principal knew he was employed by seller.

If, in an action against a buyer of land for a broker's commissions, the plaintiff's evidence leaves it doubtful whether, while acting for defendant, he also was employed by A., the owner of the land, to sell it, or simply had an option on the property at the price named, the defendant is entitled to have the jury instructed that, "if the plaintiff acted as agent for A., without disclosing the fact that he was such agent to the defendant, he can not recover a commission from the defendant." *Carpenter v. Fisher*, 175 Mass. 9 55 N. E. 479. See also Sec. 314.

Sec. 977. Instruction proper that brokers could not recover unless defendant knew they would get pay from the other party.

On the issue, whether real estate brokers suing to recover commissions for effecting an exchange of property, who had stipulated for commissions from both parties, were agents for both parties so as to forfeit their right to compensation, or mere middlemen, the court charged that no recovery could be had if the contract was one of agency, instead of that of middlemen; that the brokers claimed that all they agreed to do was to find a man willing to make the trade; and that defendant claimed that they agreed to take the property and do the best they could with it; and that, if defendant's contention were true, the brokers could not recover commissions, unless defendant knew, before employing them, that they had stipulated for commissions from the other party. *Held*, that the instruction was sufficient. *Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229. See also Sec. 314.

Sec. 978. Instruction that if commission was to be paid, defendant would not have sold and plaintiff barred recovery, properly refused.

In an action by a real estate broker for commissions, in which there was evidence that the principal had sold the property to a purchaser procured by the broker, an instruction that the defendant would not have sold the property if he had known that he had to pay plaintiff a commission, plaintiff

could not recover, was properly refused. *Enochs v. Paxton*, 87 Miss. 660, 44 S. 14.

Sec. 979. Instruction that buyer by repeating offer was enabling plaintiff to recover, error as suggesting conspiracy.

In an action by a real estate broker for a commission for procuring a purchaser for a farm, who at first stated to the owner that he would not buy it, but who, on the same day, offered to take it on the terms agreed on, an instruction that he would have no right to return and offer to take the farm for the mere purpose of collecting a commission from defendant, was erroneous, as suggesting a conspiracy between the broker and the purchaser. *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157.

Sec. 980. Instruction to find for plaintiff if believed he was trying to sell land, not warranted by pleadings.

Where a real estate broker, suing for commissions, alleges that through his efforts the land was sold, an instruction that if the jury believe plaintiff was trying to sell the land, etc., they should find for him, is not warranted by the pleadings. *Yarbrough v. Creager* (Tex. Civ. App. '03), 77 S. W. 645.

Sec. 981. Instruction proper defining distinction between selling to broker's customer and to a third party.

In an action for commissions on a sale of defendant's land, an instruction that the jury should find for the defendant if the plaintiff had been unable to procure a purchaser, and had abandoned his efforts to procure one, was not reversible error for making defendant's rights dependent upon two states of facts, either of which was sufficient in itself, in view of the fact that plaintiff's claim was that he found a purchaser to whom defendant sold, pending plaintiff's negotiations for a sale, and that the court also instructed on the distinction between selling to the plaintiff's customer and to a third party. *Van Tobel v. Stetson*, 32 Wash. 683, 73 P. 788.

Sec. 982. Instruction that sale effected through broker's efforts is meritorious, improper.

In an action by real estate agents for commissions, a charge that where a sale is effected through the efforts of a real

estate agent, "his services are regarded in law as highly meritorious and beneficial," is improper. *Bowie v. Gage*, 127 Wis. 245, 106 N. W. 1074, 115 Am. St. R. 1010.

Sec. 983. Instruction that broker must show retainer or acceptance by principal, not usually prejudicial.

An instruction that a broker must show a retainer or that the principal accepted his agency and ratified his acts, is not prejudicial to the principal, although there is no evidence of ratification, where the jury was instructed as to what is necessary to constitute a ratification. *Duncan v. Borden*, 13 Colo. App. 481, 59 P. 60.

Sec. 984. Instruction assuming broker acted for defendant erroneous, although that separately submitted.

In an action by a real estate broker for commissions, the defendant answered denying the broker's employment, and testified that he merely inquired of the broker if the latter had a customer who would exchange land for the defendant's stock; that the broker responded that he had; that defendant then said he was putting in his own time trading, and wanted it understood that he would not pay a commission; the court instructed, if it appeared that at defendant's instance the broker procured a customer, etc., and that it appeared that when defendant listed his property with the broker, the latter in bringing the parties together, etc., was acting for both of them. *Held*, that the instruction was erroneous in assuming that the broker was acting for the defendant, though the issue as to defendant's promise to pay a commission was separately submitted. *Casady v. Carraher*, 119 Iowa, 500, 93 N. W. 386.

Sec. 984a. Instruction to find for plaintiff held not misleading when condition favoring defendant also given.

Where, in an action for a broker's commissions on a sale of real estate, the court charged that the jury should find for defendant, if a specified condition had been imposed for the sale, and the sale was made without reference thereto, an instruction that if the broker by himself, or through his sub-agent, produced a purchaser ready, able and willing to buy on the terms

agreed on between the broker and the owner, the owner was liable, was not misleading, for, if the specified condition had been imposed, the charge required proof that the sale had been effected accordingly. *Hansen v. Williams* (Tex. Civ. App. '08), 113 S. W. 312.

Sec. 985. Instruction that unless they find contract entered into must find for defendant, insufficient.

In an action by a real estate agent for commissions, in which defendant claimed that a contract to pay commissions was not made with plaintiff personally, but with him as agent of his father, an instruction that the first question to determine was whether the contract was between plaintiff and defendant, or between plaintiff's father and defendant, and that unless the jury find that the contract was entered into between plaintiff and defendant they should find for the latter, was not a sufficient statement of the principle that defendant was not liable if the contract was made with the principal as agent. *Snyder v. Fidler*, 125 Iowa, 378, 101 N. W. 130.

Sec. 986. Instruction that broker could recover if, when negotiations were broken off, buyer still intended to buy erroneous.

In an action for commissions on a sale of land, an instruction which assumes a ratification of plaintiff's authority to sell, but directs that plaintiff might recover if the subsequent sale of the land by the owner to the same person with whom plaintiff has previously negotiated, if at the time negotiations with him were broken off, the purchaser had not given up the idea of ultimately making the purchase, is erroneous. *Gillet v. Corum*, 5 Kan. 608. See also Sec. 447.

Sec. 986a. Charge of cancellation of broker's contract improperly refused.

In an action for a broker's commissions, an instruction that if defendant told plaintiff, or his partner, to take the land off the market, that it was not for sale, to find for defendant, was improperly refused, though the court instructed in a general way that plaintiff could not recover if defendant had with-

drawn authority to sell. *Taylor v. Read* (Tex. Civ. App. '08), 113 S. W. 191.

Sec. 987. Instruction that delegated authority can not be re-delegated, misleading and erroneous.

Where a land owner authorized a person to write to an agent authorizing him to sell real estate, which the agent does pursuant to the letter so written, after which the land owner disputes his authority to sell, an instruction that a delegated authority to an agent to sell real estate can not be re-delegated, is misleading and erroneous. *Gross v. Schafer*, 29 Kan. 442. See

Sec. 987a. Prejudicial error in charge to jury recalled for further instructions.

An instruction, in an action for a broker's commissions, after the jury had been recalled, and had announced that they were not likely to agree upon a verdict, that such trials were costly to the county, that if results are not reached people lose faith in the ability of the courts to deliver justice; that the single question in the case, which could be solved readily, was whether plaintiff, by his sub-agent, procured a customer, and whether the parties dealt, that if so, plaintiff was entitled to his commissions; and that the case was the simplest ever presented to a jury, was prejudicial error, as in fact directing a verdict for plaintiff, though the court had previously instructed that before the plaintiff could recover he must prove by a fair preponderance of the evidence that defendant contracted with him, or that she authorized her husband to do so, etc. *Ebert v. Wilcox*, 155 Mich. 69, 118 N. W. 735, 15 D. L. N. 967.

Sec. 988. It was error to refuse instruction that plaintiff's employment to procure a tenant was revoked by interview.

Where, in an action for a broker's commissions in negotiating a hotel lease, the court charged that the jury could find for the plaintiff, either if plaintiff's agency had been revoked or if the revocation was made in bad faith, the refusal of certain instructions, "that under the evidence plaintiff's employment to procure a tenant was revoked by what took place

in a certain interview between plaintiff and defendant," could not be sustained on the theory that a revocation, if in fraud of plaintiff's rights, would not amount to a revocation. *Cadigan v. Crabtree*, 192 Mass. 230, 78 N. E. 412.

Sec. 989. Instruction to find for defendant on one state of facts, for plaintiff on another, not inconsistent.

An instruction, in an action by a real estate agent for commissions, to find for defendant if he employed plaintiff to sell his land and agreed to pay him a commission, and subsequently and before the purchaser had been produced to defendant, or a written contract secured by plaintiff for a sale, defendant notified him that he would, three days later, take the land from his list, and that he never made any further effort to sell; and an instruction to find for plaintiff, if defendant agreed to pay him a commission for selling his land, and plaintiff, as his agent, made a verbal contract with E. to sell him the land on the stipulated terms, and a month later E. made a written contract with plaintiff to buy the land on such terms, and E. was financially able to execute such contract, though in the time between the making of the verbal and written contracts defendant notified plaintiff he had terminated his agency, are not inconsistent, and both are correct. *Kesterson v. Cheuvront* (Mo. App. '02), 70 S. W. 1091; *Weinman v. Spencer* (Tex. C. A. '09), 124 S. W. 209; *Benton v. Brown* (Iowa Sup. '10), 124 N. W. 815.

Sec. 990. Instruction to find for defendant if plaintiff abandoned employment, did not harm defendant.

In an action by a real estate agent for commissions, in which it was claimed that plaintiff had abandoned his agency, an instruction that if the jury believed he had abandoned the agency he could not recover, though faulty for failure to state the specific facts alleged to constitute the abandonment, could not have harmed defendant. *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171.

Sec. 990a. Charge held not to require a verdict for defendant.

The evidence being conflicting as to whether the property was withdrawn from the market before or after the owner's

employment of the broker, a charge, in the broker's action for compensation, that if, before the broker submitted the property for sale to a prospective purchaser, the owner had refused the offer of the prospective purchaser, defendant should recover, did not require a verdict for defendant. *Brady v. Maddox* (Tex. C. A. '09), 124 S. W. 739.

Sec. 990b. Charge interpreted not to require the jury to ignore the special charges.

A general charge that the jury should find a verdict upon a preponderance of the evidence, under the foregoing charge, followed by defendant's special charges, was not erroneous as requiring the jury to find a verdict under the general charge alone, and to ignore the special charges, since the jury could not have understood that after the special charges were given they were to be ignored. *Brady v. Maddox* (Tex. Civ. App. '09), 124 S. W. 739.

Sec. 991. Instruction that broker only required to find purchaser if land had average quantity of timber, erroneous.

Where in an action for a broker's services in the selling of timber land, a letter written by defendant was silent as to an "average quantity" of timber, certain instructions charging that defendant's proposition contained in such letter only required plaintiff to secure a purchaser of all land if it contained an average quantity of timber, were erroneous. *Veatch v. Norman*, 109 Mo. App. 387, 84 S. W. 350.

Sec. 992. Instruction that if defendant made promise verdict should be for plaintiff, correct.

Where plaintiff seeks to recover \$1,000 for making a sale, on the ground that there was a special contract therefor, there is no error in charging that if defendant made the promise, the verdict should be for plaintiff, there being no request for an instruction on the want of consideration, and defendant's testimony that, at the time of the sale, and before as well as afterwards plaintiff was in his employ, and whatever services he rendered, including any he may have rendered in connection with the sale, were within the scope of his said employ-

ment, and any such special contract was without consideration, being too vague and uncertain to warrant a finding that the special services were within the scope of any contract between them other than that sued on. *Keyser v. Reilly*, 191 Pa. St. 271, 43 A. 317, 44 Weekly N. C. 240.

Sec. 993. Instruction that agent through whose effort buyer found entitled to commission, inapplicable to proof.

In an action by a broker for commissions, where there was no evidence that defendant had employed others to make a sale of the property, an instruction that the agent, through whose efforts a purchaser was found, is alone entitled to the commissions, though legally correct, was erroneous as inapplicable to the proof. *Leech v. Clemons*, 14 Colo. App. 45, 59 P. 230.

Sec. 994. Instruction authorizing finding against plaintiff, though procuring cause of sale, erroneous.

In an action for the commissions of a real estate broker, instructions that if plaintiff and another broker both had the premises for sale, and the other first directed the purchaser's attention to the property, and first visited the property with him, he was entitled to the commissions, though plaintiff afterwards took the purchaser to the property and introduced him to the owner, were erroneous, because authorizing a finding against plaintiff, though he was the procuring cause of sale, and as such entitled to compensation. *Bowser v. Mick*, 29 Ind. App. 49, 62 N. E. 513.

Sec. 994a. Instruction erroneous which disregards who was the procuring cause of the sale.

Where, in an action by a real estate broker for commissions, the issues involved the question whether the efforts of the broker were the procuring cause of the sale, an instruction authorizing a recovery on a finding that the broker was employed to procure a purchaser and introduced a customer to the owner to whom a sale was subsequently made, without requiring a finding that the broker was the procuring cause of the sale was erroneous. *Russell v. Poor* (Mo. App. '08), 115 S. W. 1.

Sec. 995. Instruction held inconsistent with another that contract had been ratified.

In an action by a real estate broker for commissions, a charge that if the purchasers were accepted by defendant as satisfactory, the verdict should be for plaintiff, but, if not, to authorize a recovery it must be shown that the purchasers were ready, willing and able to perform their part of the contract, within a reasonable time from that named therein, was inconsistent with another charge that the contract had been ratified and confirmed by defendant and was binding on him. *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326.

Sec. 996. Instruction that if plaintiff materially altered contract, without defendant's knowledge, it would not bind him, not objectionable.

In an action for a broker's commissions, an instruction that the sale contract contained the terms of the sale and plaintiff's authority, and that he had no right to sell the land on any other terms, and if he changed the contract, without defendant's knowledge or consent, by striking out the rate of interest to be paid, it was a material alteration, and would not bind defendant, nor entitle plaintiff to recover his commissions, was not objectionable, in that it omitted to charge that, if plaintiff made the change in good faith, believing that it was in accordance with the understanding of the parties, there was no fraud. *Robertson v. Vasey*, 125 Iowa, 526, 101 N. W. 271. See also Sec. 969.

Sec. 997. Instruction that where owner knew, he is not bound to decide which was procuring cause, properly refused.

An instruction that an employer of two or more real estate brokers may make a sale to the buyer produced by either of them, and is not bound to decide which of them is the primary cause of the purchase, is properly refused, where the evidence shows that the employer of two brokers, sued by one of them, had full notice that he was the procuring cause of the sale. *Eggleston v. Austin*, 27 Kan. 245.

Sec. 998. Instruction that plaintiff not entitled to recover unless he sold at price fixed, correct.

In an action to recover commissions for selling land, in which defendants pleaded in their answer that the contract was that plaintiff was to sell the land and have a commission of one and one-half per cent. if he sold it at \$90 per acre, and that they had taken the land out of the hands of plaintiff for sale and sold it themselves, they can not complain of an instruction to the jury to find for them, if the jury believed that the only contract was that if plaintiff would sell the land for defendant at the price of \$90 per acre defendants would pay one and one-half per cent. commissions, and that plaintiff failed to sell the land, or find a buyer therefor at that price. *Prewitt v. West*, 22 Ky. L. R. 492, 55 S. W. 884.

Sec. 999. Instruction, if defendant not requested to furnish abstract of title, plaintiff not entitled to recover, properly refused.

In an action by a broker for commissions for finding a purchaser for defendant's land, plaintiff claimed that defendant had been required to give an abstract of title, which he had not done, hence defeating the sale; defendant denied that he had been "requested;" but his evidence showed that the abstract "had been required," and the contract with the broker provided that "if required," an abstract should be furnished. *Held*, that defendant could not complain of the refusal of an instruction that, if defendant was not requested to furnish an abstract, plaintiff was not entitled to recover. *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723.

Sec. 1000. Instruction erroneous in eliminating question of connection between the transactions.

Where, in an action for a broker's services, plaintiff claimed that the defendant agreed to pay him \$1,000,000 in case he purchased a railroad which plaintiff was endeavoring to sell, or became interested therein, and plaintiff claimed that thereafter defendant did become interested by participating in a syndicate by which such railroad was consolidated with another, an instruction that plaintiff's contention was that defendant

agreed to pay \$1,000,000 if he went in with any one else in the purchase of the property, and that when he participated in the syndicate, "he did go in with somebody else, and therefore became indebted to him in the sum of \$1,000,000," was erroneous, in eliminating the question whether there was any connection between the transaction with the defendant and the purchase of the road by the syndicate of which he afterwards became a member. *Mingis v. Fitzgerald*, 95 N. Y. S. 436, 108 App. Div. 24.

Sec. 1001. Instruction erroneous, which confines to one interpretation, where terms of contract are in dispute.

Where the contract between the broker and his principal is oral, and its terms are in dispute, it is error to instruct the jury, that if the plaintiff brought the purchaser to the notice of the seller he is entitled to commissions, and that that was the only question for them to determine, unless, under the only reasonable interpretation of which the language of the parties was susceptible, in the light of the circumstances, that was all he was required to do to earn the commissions. *Henderson v. Sonneborn*, 30 Pa. Sup. Ct. 182.

Sec. 1001a. Erroneous qualification in charge to jury.

In an action by a broker for commissions on a sale of land, it was error to qualify an instruction that plaintiff could not recover if he was acting for both parties, by the statement: "Unless his double employment was understood," without stating, that it must appear the buyer knew, or had been informed by plaintiff of his relation to defendant; since the jury might have inferred that even if defendant knew plaintiff was the agent of the buyer, and unless plaintiff fraudulently induced him to believe that he was serving only in his interest, the failure to disclose to the buyer the employment by defendant would not bar recovery. *Sullivan v. Tufts* (Mass. Sup. '09). 89 N. E. 239.

Sec. 1002. Instruction that contract was invalid, misleading and prejudicial.

Plaintiff claimed that defendant had promised to pay a certain sum on his procuring a contract for the sale of his land,

and that he had done so; defendant contended that he had so promised, provided the sale, as agreed on, should be consummated. *Held*, that the question whether the contract of sale could be legally enforced was immaterial, under the issues, and an instruction that it was invalid was misleading and prejudicial. *Baird v. Gleckler* 11 S. D. 233, 76 N. W. 931.

Sec. 1003. Erroneous instruction not cured by requiring a finding that a contract still existed.

Where a broker's contract for services required a sale of nineteen quarter-sections of land within thirty days, at \$9 per acre, the broker to receive one dollar per acre commission, an instruction, in an action for commissions on the contract, that if the jury found that plaintiff procured a purchaser for all the land within the time, who was able, ready and willing to purchase, then plaintiff was entitled to recover the amount claimed, though only sixteen quarter-sections were sold to the procured purchaser, and by the owner himself, for a less sum than the price fixed in the contract, was not cured by a proviso requiring the jury to find that at the time the sale was finally consummated there still existed a contract between plaintiff and defendant to pay one dollar per acre commissions. *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719.

Sec. 1004. Where agent testified owner agreed to all sales, it was error to instruct for defendant as to any.

Where an agent testified that the owner agreed to the prices at which he sold the different tracts, it would be error to instruct the jury to find for the defendant as to any of the tracts. *McLane v. Goode* (Tex. Civ. App. '02), 68 S. W. 707.

Sec. 1005. Instruction proper, that if plaintiff aided and assisted in sale of railway, defendant was liable.

In an action to recover for services in promoting the sale of a street railway, it was proper to instruct the jury that defendant was liable if they found that plaintiff aided and assisted in the negotiations with the prospective vendee, where this was the gist of the undertaking sued on. *Alexander v. Wakefield* (Tex. Civ. App. '02), 69 S. W. 77.

Sec. 1005a. Instruction defining word "solicit" upheld.

An instruction in an action for commissions as sales agent, that the word "solicit," as used in the contract, meant to seek for, and that it was incumbent upon plaintiff to show that he endeavored to obtain purchasers for defendant, persons who, in fact, did purchase; that it was not necessary for plaintiff to show that the purchasers made the trip solely upon his solicitation, but that if the sale was made to them on account of former dealings of defendant with them, through plaintiff's agency at the place where plaintiff resided, and that plaintiff aided and assisted in bringing them together, and encouraged and endeavored to induce the purchasers to make the trip, this would be a solicitation by plaintiff, entitling him to commissions on the sale, imposed upon plaintiff every burden resting upon him to entitle him to recover. *Curlee v. Reeves* (Neh. Sup. '09), 123 N. W. 420.

Sec. 1006. Instruction for plaintiff erroneous, where the evidence is conflicting.

In an action for services rendered in purchasing property where there was a conflict in the evidence as to whether or not plaintiff had performed the services which he was employed to perform, a charge authorizing a recovery for plaintiff, without requiring the jury to find that he had performed the stipulated services, was erroneous. *St. Louis, S. W. P. Co. of Texas v. Irvine* (Tex. Civ. App. '05), 89 S. W. 428; *Trees v. Milliken* (Ind. App. '08), 85 N. E. 123.

Sec. 1007. Instruction erroneous which leaves the jury to determine what constitutes a valuable consideration.

Plaintiff, as broker, sold a ranch for defendant, a farm being taken in exchange for part of the price; defendant refused to pay any commissions on the value of the farm; after the sale of the farm plaintiff sued for commissions thereon, claiming that he had accepted the settlement as to commissions on the sale of the ranch, on an agreement for a commission on the sale of the farm; defendant claimed that, while he had authorized plaintiff to assist in selling the farm, it was sold by defendant himself; the court instructed that if a contract for commissions on a sale of the farm was made for

a "valuable consideration," and plaintiff complied with his contract, and the farm was sold "at a price and upon terms acceptable to defendant," plaintiff was entitled to recover, and refused to instruct that "if defendant failed to pay all the commissions for the sale and exchange of the ranch, and the parties agreed in lieu thereof, he was to have a commission on the sale of the farm," etc., "plaintiff was entitled to recover." *Held*, that there was error in the giving and refusing of the instructions, the jury having been left to determine what would be a valuable consideration, and the words "at a price and on terms acceptable to defendant" being superfluous and probably misleading. *Harrison v. Houston* (Tex. Civ. App. '06), 91 S. W. 647.

Sec. 1008. Instruction properly refused which ignored plaintiff's theory of cause of sale.

In an action by a real estate broker for his commissions in securing a purchaser, an instruction is properly refused which ignores plaintiff's theory that the efficient cause of the sale was the vendor's representative acting with him and accepting his services, with knowledge of his occupation, although such representative may have acted with other agents in some matters respecting the sale. *J. P. Watkins Land & Mtg. Co. v. Thetford* (Tex. Civ. App. '06), 96 S. W. 72.

Sec. 1009. Instruction properly refused that broker to earn commissions must notify his principal.

Where, in an action for a division of a broker's commissions, the contract between the parties provided that if plaintiff would "assist" in obtaining a purchaser he should be entitled to one-half the commissions earned, an instruction that unless the person claiming the commissions find such purchaser and communicate the fact to the other party at the time, he can not recover, was properly refused. *McCleary v. Willis*, 35 Wash. 676, 77 P. 1073.

Sec. 1009a. Failure to instruct as to notice held not error.

In an action for a commission on a sale of land, an offer to show that there was a supplemental contract, and that by an oversight, mistake or fraud, a stipulation that plaintiff's right

to sell the land should expire at a time which had passed, was omitted from the writing, contains no offer to prove notice of revocation of plaintiff's right, and a failure to instruct as to what constitutes such notice is not error. *Hoffner v. Chambers*, 121 Pa. St. 84, 15 A. 492.

Sec. 1010. Instruction erroneous that commission was not to be paid unless sale consummated.

In an action by a real estate broker for commissions, it appeared that the owner authorized plaintiff to sell certain real estate for \$41,000, agreeing to pay a commission; plaintiff claimed the making of a verbal modification to the effect that he should receive the commission, without regard to price, which modification is denied; a contract was introduced in evidence between the owner and another for a sale for \$40,000, but it was claimed that certain interlineations in the contract were made after it had been signed by the owner, and that he never agreed to it in its altered condition; there was also evidence that plaintiff procured a purchaser for \$42,000, but the owner refused to perform. *Held*, that it was error to instruct that the commission was not to be paid unless the sale was consummated, and that the risk of failure was wholly on the broker. *Bruce v. Hurlbut*, 81 N. Y. S. 54, 81 App. Div. 311. See also Sec. 969.

Sec. 1011. Instruction that if broker changed contract believing defendant would see before signing, not prejudicial to plaintiff.

In an action for broker's commissions, an instruction that if the broker caused a change to be made in the contract, believing that defendant would see the change when the contract was delivered to him, then the defense of fraud on the part of the broker in so changing the contract was not sufficiently established to defeat plaintiff's claim for commissions, was not prejudicial to plaintiff. *Robertson v. Vasey*, 125 Iowa, 526, 101 N. W. 271.

Sec. 1012. Instruction that to entitle him to commissions the broker must have acted in good faith, is proper.

Where the evidence tended to show an interest on the part of a real estate broker in the contract of purchase, an instruc-

tion that to entitle him to commissions he must have acted in good faith and in the interest of his employer. *Held*, not erroneous. *Buck v. Hogeboom*, 125 Neb. 526, 90 N. W. 635.

Sec. 1013. Instruction, in answer to question by foreman, that jury not bound by any rule in fixing damages, error.

In an action by a real estate broker for commissions, it was error to tell the jury, in answer to a question by their foreman, that they were not bound by any rule in fixing damages, as the court should have charged them that the rule was the customary commissions in such cases, or, if the evidence was insufficient on that question, what would be a fair compensation. *Hartman v. Warner*, 75 Conn. 197, 52 A. 719.

Sec. 1014. Instruction proper, that if plaintiff entitled to commissions, jury should determine their value.

In an action for a broker's services, it was proved that the value of plaintiff's services for furnishing a purchaser of the land was one dollar per acre, and that it was worth the same for "selling;" defendant's answer admitted plaintiff's services in "selling" the land, and the case was tried on the theory that the services in "selling" or "furnishing a purchaser" were the same. *Held*, that the court did not err in charging that, if the jury found the plaintiff was entitled to a commission for services in "selling" the land, it should determine the value thereof. *Wallick v. Lynch* (Iowa Sup. '06), 106 N. W. 617.

Sec. 1015. Instruction rightly refused, that if entitled to anything broker confined to a quantum meruit.

In an action for services as a broker in procuring defendant a contract to purchase land, a request for a ruling that the plaintiff could not recover more than a *quantum meruit* for his services as a broker, if entitled to recover anything, was held rightly refused, as it assumed that plaintiff had been acting as a broker, while the question whether he had been so acting or not was in issue, and as it disregarded the plaintiff's claim that there was a special agreement between the defend-

ant and himself, of which there was evidence for the jury. *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336.

Sec. 1015a. Instruction held properly refused.

An instruction that a real estate agent is not entitled to recover for his services if he failed to accomplish the sale, and the vendee was induced to reconsider his resolution and purchase by another agent, notwithstanding the vendee might never have looked at the property or thought of buying it but for plaintiff, "as his agency was not the immediate and efficient cause of the sale," was properly refused, where there was no evidence that another agent was instrumental in effecting the sale, and also, because the jury were likely to misunderstand the last clause, and regard it as an independent part of the instruction. *Solomon v. Cress*, 29 P. 439, 22 Or. 177.

Sec. 1016. Instruction authorizing recovery upon either of two hypotheses, not in conflict.

In an action for a broker's commissions against stockholders of a brewing company for a sale of its property, where the evidence showed that the debts of the company were about \$30,000, that the purchasers assumed this indebtedness, relieving defendants from any liability thereon, and that by the written contract of sale the purchasers relieved defendants of all personal liability on the obligations of the company, not to exceed \$30,000, there was no conflict between instructions authorizing a recovery of ten per cent. of the debts of the company from which the defendants were to be relieved as sureties, and one authorizing a recovery of ten per cent. of the debts of every kind of the company. *Morgan v. Keller*, 194 Mo. 663, 92 S. W. 75.

Sec. 1017. Instruction proper, where some sales are admitted, to award commissions, though no contract be proved.

Where plaintiff alleged a contract for commissions and sales made thereunder, and defendant denied the contract, but admitted some of the sales and that he was indebted to plaintiff in a reasonable sum for commissions thereon, an instruction that, if the jury did not find that there was a contract, then

they should award plaintiff reasonable commissions, was proper, such issue being raised by defendant. *Wheeler v. Buck*, 23 Wash. 679, 63 P. 566.

Sec. 1018. Instruction that if sales were made within contract to pay commissions to plaintiff, is sufficiently definite.

In an action for a broker's commissions, the court's charge, that if the purchasers went to South Dakota, by reason of plaintiff's introduction to defendant, and examined the lands defendant had for sale, and if defendant participated in the business resulting in sales, then the sales were made by defendant within his contract to pay to plaintiff, was a sufficiently definite instruction on the issue, of the manner in which defendant must have sold the land in order to render himself liable. *Murphy v. Hiltbride*, 132 Iowa, 114, 109 N. W. 471.

Sec. 1019. Instruction erroneous, as question of broker's authority was for the jury.

Where a fruit farm was listed for sale with a real estate agent, who, in turn, listed it with another agent, and there was evidence tending to show authority of the latter to make representations relating to the farm, the court should not have instructed that the owner was bound by representations made by him, but should have submitted the question of his authority to the jury. *Matler v. Jeffries*, 145 Mich. 598, 108 N. W. 994, 13 D. L. N. 600.

Sec. 1019a. Instruction erroneous that invades the province of the jury.

An instruction in an action for commissions for selling land selecting language that the parties used, that might be evidence of the annulment of a contract, and informing the jury of its probative effect, would have been on the weight of the evidence, and an invasion of the province of the jury. *Mumme v. Gates* (Tex. Civ. App. '09), 120 S. W. 1046.

Sec. 1020. Instruction where contract was for sale to certain party, which failed, plaintiff could not recover.

There being evidence that defendant only contracted with plaintiff with reference to a sale to a certain party, which sale fell through, defendant was entitled to a charge that plaintiff could not recover if the contract was so limited. *Wefel v. Stillman*, 151 Ala. 249, 44 S. 203.

Sec. 1021 Instruction erroneous, which relied on usage, in not requiring the jury to find the existence thereof.

In an action by a real estate broker for commissions for selling a leasehold, plaintiff's prayer for an instruction which relied on usage and custom to fix the amount to which he was entitled, was erroneous in not requiring the jury to find the existence of a uniform and notorious custom regulating the compensation of agents making sales of leaseholds. *Groscup v. Downey*, 105 Md. 273, 65 A. 930.

Sec. 1022. Instruction erroneous, that because husband had charge of real estate, had authority to employ a broker.

In an action for commissions for selling real estate, an instruction that if defendant's husband "was agent in charge of said property, and for the sale of the same, and defendant's said agent employed plaintiff" to procure a purchaser, and the property was sold by defendant to a purchaser procured by plaintiff, he was entitled to recover, was erroneous, in that it in effect instructed the jury, as a matter of law, that if defendant's husband was the agent in charge of said property and for the sale of the same, he had authority to employ another to procure a purchaser. *Id.* See also Sec. 39.

Sec. 1023. Instruction properly refused, to find for plaintiff, where liability of defendant was for the jury.

An instruction requested by plaintiffs, in an action by real estate agents for commissions, that, though the jury find it was agreed between plaintiffs and defendants that commissions should not be paid unless defendants actually traded a certain building for a ranch controlled by plaintiffs and passed title, yet if they find that it was the act of defendants which

prevented the exchange being made, they should find for plaintiffs, they having procured a person ready and able to make such trade on terms satisfactory to defendants, is properly refused as misleading, it being conceded that, as between defendants and the owners of the ranch, it was the act of defendants which prevented the exchange being made, and there being evidence that the act was compelled against the wishes of defendants by circumstances which they could not avoid, and which, under the contract of employment was sufficient to absolve them from liability for the commissions. *Rieger v. Merrill*, 125 Mo. App. 541, 102 S. W. 1072. See also Sec. 125.

Sec. 1024. Instruction to find for one of competing brokers is correct, even though he did not close the trade.

An instruction, at defendant's request, in an action to determine which of two real estate brokers was entitled to the commissions for selling land, that where real estate was listed for sale with several real estate agents acting independently, the one who succeeded in bringing about a contract between the seller and the purchaser was the one who earned the commissions, regardless of the fact that some other real estate men may have introduced the purchaser to the seller, if error, as excluding the theory that the broker who is the procuring cause of the sale is entitled to the commission, did not constitute a reversible error, where instructions were given in plaintiff's behalf, that if the purchaser of the land had it first brought to his notice by plaintiffs, who, at his solicitation, disclosed the owner's name, and the information received from plaintiffs was the primary cause of the purchaser afterward buying the land, then plaintiffs were entitled to recover, even though defendants showed the purchaser the land and assisted in closing the trade, and that if the purchaser promised plaintiffs to take it, if it suited, before defendants brought the land to the purchaser's notice, and the owner was notified by the plaintiffs of that fact, and the defendants afterwards took the purchaser to show him the land, then plaintiffs were entitled to recover, even though they did not close the trade for the land. *Painter v. Kilgore* (Tex. Civ. App. '07), 101 S. W. 809; *Smith v. Sharp* (Ala. Sup. '09), 50 S. 381. See also Sec. 446.

Sec. 1025. Instruction erroneous, as to reservation in deed of mineral deposits.

Error in the instruction on a contract to procure a purchaser for defendant's land, wherein plaintiff contended that he found purchasers and that the sale failed solely because of defendant's defective title, in that the instruction was open to a construction that, from the fact that the attorney for the purchasers saw the deed, it was conclusively established that the purchasers knew the reservation therein of marl mineral and gas deposits, was not cured by undisputed testimony that plaintiff stated to the purchasers, or one of them, that defendant would reserve the mineral deposits, or by the further instruction that plaintiff must prove that the purchasers knew about and consented to the reservation. *Weaver v. Richards*, 150 Mich. 20, 113 N. W. 867, 14 D. L. N. 617, 120 N. W. 818, 16 D. L. N. 117.

Sec. 1026. Instruction assuming absence of special contract and existence of custom, erroneous.

In an action of assumpsit for brokerage commissions, an instruction assuming the absence of a special contract and the existence of an established custom as to commissions, is erroneous, the fact of the existence of such custom being one which should be submitted to the jury under proper instructions. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

Sec. 1027. Instruction that plaintiff was employed to supervise erroneous, as ignoring the defense.

Where plaintiff, an architect, about to supervise the erection of a building, advised defendant to have his adjoining building underpinned before excavations for the new building began, and thereupon defendant agreed with a contractor that the latter, for a specific sum should, under plaintiff's supervision, underpin defendant's wall, and defendant and a witness testified that the specified sum was to cover the entire cost of the work and that plaintiff agreed to charge nothing for his supervision, an instruction that by the contract plaintiff was employed by defendant to supervise the contractor's work, was erroneous, as ignoring the defense, as plaintiff may have been working for

compensation or giving his services gratuitously because of his interest in the adjoining property. *Kirchner v. Concord Inv. Co.*, 127 Mo. App. 262, 104 S. W. 1127.

Sec. 1028. Instruction ignoring whether plaintiff's efforts had ceased or his agency revoked, error.

Where, in an action for a broker's commissions, there was evidence that plaintiff's agency had been revoked before defendant began negotiations with the purchaser, while plaintiff's evidence indicated that such revocation was made with knowledge that it was through plaintiff's efforts the purchase was made, an instruction ignoring the question whether plaintiff's alleged efforts to sell the land had not been abandoned or his agency revoked before defendant and the purchaser met, was erroneous. *Christian v. McDonnell*, 127 Mo. App. 630, 106 S. W. 1104.

Sec. 1028a. Not error for the court to charge that if sale made to broker's customer after he abandoned negotiations he was not entitled to commissions.

In an action by a broker for commissions, the court did not err, as against the owner, in modifying an instruction requested by him, that the broker could not recover if he did not agree on the terms of sale with the one who purchased from the owner, though the broker procured the sale, by adding that he could not recover if the sale was made after he abandoned the negotiations or the person with whom he was negotiating declined to purchase. *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134.

Sec. 1029. Instruction to find for architect, if claim believed erroneous for not submitting defendant's claim.

Where, in an action by an architect, he alleged that the owner was to pay for superintending five per cent. of the lowest bid, which was \$6,150, and the owner alleged that he was only to pay, provided a contractor was procured to erect the building for \$4,000, and there was evidence that the lowest bid was a little over \$5,000, an instruction authorizing a verdict for the amount sued for, if the jury believed the architect's

claim, was erroneous, as withdrawing from the jury the question of the amount of the lowest bid. *Loftus v. Green* (Tex. Civ. App. '07), 104 S. W. 396.

Sec. 1030. Instruction that though terms unauthorized, find defendant ratified contract, correct.

In an action to recover a commission for finding a purchaser for land, an instruction that if the terms of the contract made by the brokers with the proposed purchaser were unauthorized by defendant, before recovery could be had against him, the jury must find that he ratified the contract with full knowledge of the facts and its terms, was not objectionable as being on the weight of the evidence. *Sterling v. DeLaune* (Tex. Civ. App. '07), 105 S. W. 1169.

Sec. 1031. Instruction properly refused that if owner believed relations with broker ended, latter could not recover.

Where a land owner employed a broker to sell certain land and thereafter, while the broker was negotiating with a prospective purchaser, the landlord asked him to make no further efforts to sell the land since the land owner's wife would not join him in executing the deed, to which the broker replied, "All right," and directly afterward the land owner sold the land to a purchaser secured by the broker, the court, in an action by the broker for his commissions, properly refused an instruction that if the broker induced the land owner to believe that the relation between them was terminated and the land owner acted upon such belief in making the sale contract, the broker could not recover. *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1178.

Sec. 1032. Instruction fully submitted two contentions as to the right of plaintiff to commissions.

Prayers in an action by a real estate broker to recover from other brokers for a commission received by them from the sale of a lot that if the court found that there was no agreement to make any division of the commissions then the verdict must be for plaintiff, whether or not plaintiff was a licensed real

estate broker, and that if plaintiff introduced the purchaser to defendants or those for whom they acted, and gave defendants notice of the negotiations between plaintiff and the subsequent purchaser and a sale was made to such purchaser as the result of the introduction by plaintiff, the verdict must be for plaintiff, and that if a sale was made through the bringing of the parties together by plaintiff then plaintiff was entitled to recover, even though the sale may have been effected by a direct agreement between the defendant and the purchaser, fully submitted the two contentions of plaintiff that there was an express agreement to divide the commissions, and that if there was no express agreement plaintiff was the procuring cause of the sale made. *Walker v. Baldwin*, 106 Md. 619, 68 A. 25.

Sec. 1033. Instruction properly refused, that if plaintiff knew defendant had only an option, he could not recover.

In an action on a contract to procure a purchaser for defendant's land plaintiff contended that he found a purchaser and that the sale was not consummated solely because of defendant's defective title; defendant testified that he at one time told plaintiff he had only an option, and that plaintiff requested him, whenever he thought the title all right, to give him a chance to buy; afterwards defendant received a deed for the land, and he tendered a warranty deed thereof to the purchasers. *Held*, that it was not error to refuse an instruction that if plaintiff knew that defendant had only an option and that, under the agreement, a sale was to be made by plaintiff at not less than a specified amount and that his commission was to be all above that amount, plaintiff could not recover. *Weaver v. Richards*, 150 Mich. 20, 113 N. W. 867, 14 D. L. N. 617.

Sec. 1034. Instruction that plaintiff found purchaser ready, able and willing, erroneous on that theory.

In an action for commissions for the sale of a lease, where the petition alleged that plaintiff negotiated the sale of a lease, and after reaching an agreement whereby the purchaser, agreeing to pay a certain price for the lease, the purchaser paid that amount to the defendant, an instruction based on the theory

that plaintiff had found a purchaser ready, willing and able to buy the lease and brought him into communication with defendant, is erroneous because outside the scope of the petition. *Northup v. Diggs*, 128 Mo. App. 217, 106 S. W. 1123.

Sec. 1035. Instruction against S. erroneous, as he was not liable in the absence of the agreement alleged.

In an action on an agreement of defendant and one S. to pay plaintiffs a certain commission for negotiating an exchange of their properties, which agreement provided for payment of the commissions on both sides, if either party should refuse to carry out the exchange contract, and it appeared that defendant had defaulted although S. was ready, able and willing to perform, it was error to charge that if there was a breach or alleged breach by defendant of the agreement to exchange, plaintiffs had a cause of action against S. for his proportion of the commissions, since, as he was ready, able and willing to carry out the contract he was not liable for commissions in the absence of the agreement alleged. *Goodman v. Linetzky*, 107 N. Y. S. 50. For the same reason it was error to charge that irrespective of the agreement as to the payment of the commissions, plaintiffs had a cause of action against S. for his proportion of the commissions. *Id.*

Sec. 1036. Error not to give instruction that if broker knew consent of third person necessary for binding contract, he could not recover.

In an action for commissions for procuring a purchaser of real estate, the defendant claimed that he was a joint owner with a third person, that the broker knew that the third person's consent to a conveyance was necessary, and that the third person refused to give his consent; and the court presented defendant's theory as a denial that plaintiff produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, the refusal to charge that if the broker knew that the consent of the third person was necessary before defendant could enter into a binding contract, and his consent could not be obtained, plaintiff was not entitled to a commission, was

reversible error, though the court stated that he would leave the matter to the jury to take into consideration in arriving at the fact. *Jacobson v. Fraade*, 107 N. Y. S. 706, 56 Misc. 631.

Sec. 1037. Instruction for plaintiff erroneous, where evidence shows absence of license.

In an action to recover commissions on a sale or exchange of real estate, where the plaintiff describes himself in his statement of claim "as a dealer in real and personal property and in the regular course of business" made the sale or exchange in question, and it is admitted that plaintiff had not taken out a license as required by law, the statement of claim is admissible as evidence tending to show that the plaintiff is a real estate broker, and where the statement is supported by the evidence of two witnesses called by the defendant it is error for the court to give binding instructions for plaintiff. *Sprague v. Reilly*, 34 Pa. Super. Ct. 332.

Sec. 1038. Instruction properly refused as assuming for plaintiff, without hypothesising belief on the evidence.

In an action for a broker's commissions, an instruction that plaintiff was entitled to a verdict for such damages as the jury believe from the evidence he has sustained from defendant's breach of contract was properly refused as assuming and instructing a finding for plaintiff without hypothesising the belief on the evidence by the jury. *Green v. Brady*, 152 Ala. 507, 44 S. 408. See also Sec. 949.

Sec. 1039. Instruction not objectionable as minimizing the issue of alteration of contract.

Where, in an action on a written contract employing plaintiff as a broker to sell defendant's land, defendant pleaded that the contract had been altered and also denied that the plaintiff had secured a purchaser, an instruction that certain evidence was admissible as bearing on "the real testimony in this case," to-wit, whether plaintiff had furnished a buyer, was not objectionable as minimizing the issue of alteration in view of other instructions directly stating that if the jury find the con-

tract has been altered they must find for defendant. *McDermott v. Mahoney* (Iowa Sup. '06), 106 N. W. 925. See also Secs. 55, 73, 293.

Sec. 1040. Instruction caused no prejudice to defendant when jury found no excess money was paid.

In an action for commissions agreed to be paid per acre in a sale of property, instructions relating to plaintiff's claim to the excess of purchase money above a named sum cannot have prejudiced defendant when the jury expressly found that no purchase money was received in excess of that sum. *Wilson v. Everitt*, 139 U. S. 616, 11 Sup. Ct. 664; *Gaume v. Horgan*, 122 Mo. App. 700, 99 S. W. 457.

Sec. 1040a. When not error to omit to charge as to responsibility of purchaser.

Where, in an action by a broker for commissions for procuring a purchaser of land, the evidence showed that the sale was consummated on the terms proposed by the owner, it was not error to omit to charge that the proof must show that the purchaser procured was able, ready and willing to complete the purchase on the terms prescribed. *Lewis v. Susmilch*, 130 Iowa, 203, 106 S. W. 624.

Sec. 1041. Instruction not inconsistent with terms of contract in securing title, etc.

In an action for commissions under a contract by which plaintiff was employed to assist defendant in acquiring a title to property for the purpose of effecting a consolidation of it with other property, a charge that plaintiff could not recover if the defendants were unable to effect a sale with the owner, and other persons in co-operation with defendant did so and effected a consolidation, even though defendant contributed to the purchase, was not inconsistent with the terms of the contract, since the thing contracted to be done was the securing of the title to the property and the making of the consolidation by plaintiff and not by another person unconnected with defendant. *Bailey v. Carleton*, 43 Colo. 4, 95 P. 542.

Sec. 1041a. Charge in the alternative held inconsistent.

Where, in an action by a broker for commissions for procuring a purchaser of real estate the evidence showed that he was employed to procure a purchaser willing to pay \$16,000, for a commission of whatever was obtained in excess of that sum, that he procured a purchaser willing to pay \$16,500 on condition that the owner should pay two and one-half per cent. thereof to the purchaser's agent as compensation in the transaction, and that the owner refused to convey, an instruction that the broker could recover \$500 and an instruction that he could recover the difference between \$16,000 and the sum which the purchaser secured by him was willing to pay for the property, were inconsistent. *Slayback v. Wetzel* (Mo. App. '09), 123 S. W. 982.

Sec. 1042. Instruction properly refused as to owner's good faith, where no evidence tended to show it.

In an action for commissions for selling real estate it is not error to refuse to submit an instruction as to the owner's good faith in selling the real estate himself without regard to the agent or the payment of commissions where there is no evidence tending to show good faith by the owner in dealing with the agent with reference to the commission. *Church v. Dunham*, 14 Idaho, 776, 96 Pa. 203, 205.

Sec. 1043. Instruction erroneous not based on hypothesis that jury must believe as contended by defendants.

Where, in an action by a real estate broker for commissions, it was contended by him that he did not bind himself to sell the property or to furnish a purchaser, as contended by defendant, but he was to be paid if he simply introduced a person to whom a sale should be subsequently made by defendants, an instruction requested by defendants applying the general rule that a real estate broker employed to sell lands must bring about a sale or procure a purchaser ready, willing and able to purchase, not based on the hypothesis that the jury must first believe the contract to be as contended by defendants, was

properly refused. *Mayer v. McCann*, 136 Ill. App. 50, affirmed in *McCann v. Mayer*, 232 Ill. 507, 83 N. E. 1042.

Sec. 1044. Instruction to find for defendant properly refused, where plaintiff's evidence is uncontradicted.

Where, in an action on a contract to pay a real estate broker a specified commission per acre on wholesale sales, or sales of large tracts, to persons whom he introduced and who subsequently purchased, the broker testified to the contract and the performance of it by introducing a person who afterwards purchased, it was not error to refuse to direct a verdict for defendant, as his (plaintiff's) evidence, standing alone and uncontradicted, authorized a verdict in his favor. *Id.*

Sec. 1044a. Request to charge for defendant properly refused.

The court, in an action to recover commissions for procuring a contract for defendant with one D. having charged that "plaintiff can not have commissions from both sides; it is claimed by the defendant that he was endeavoring to do that; if that were true, while he was working for the defendant he can not recover in this action at all, provided you believe he was entitled to get a commission from D. as well," there was no error in refusing defendant's request for a charge that if, at the time of the making of the contract between plaintiff and defendant plaintiff was negotiating with D. to do the work himself, the jury must find for the defendant. *Hume v. Flint*, 11 N. Y. S. 431.

Sec. 1045. Instruction as to the value of land received in exchange misleading.

In an action for a broker's commissions where it was conceded that a commission of five per cent. was agreed on by the parties and the evidence as to the value of defendant's land and of that which he received in exchange was conflicting, a charge imposing as a condition upon defendant's right to succeed that he did not make a contract for five per cent. commissions "as above explained" (meaning in a previous portion of the charge), and that defendant's land was only worth \$4,000

or less, while his equity in the land he received in exchange was worth only about \$2,000 or \$3,000, was misleading and prejudicial. *Jameson v. Hutchison* (Tex. Civ. App. '08), 109 S. W. 1096.

Sec. 1046. Instruction properly refused to give verdict for defendant, where suit was prematurely brought.

In an action for a broker's commissions for effecting an exchange of property, a requested charge that if defendant agreed to pay a commission on a sale of the land conveyed to him in exchange and the land had not been sold the jury should find for the defendant, was properly refused, since, under such circumstances, they should find for defendant without prejudice to sue in the event of a sale of the land. *Id.*

Sec. 1046a. Error in refusing to direct a verdict for defendant.

In an action by a real estate broker against the owner of real estate to recover a commission for procuring a purchaser of the property, with whom the owner makes a contract of sale, which he afterwards refuses to consummate, the trial court errs in refusing to direct a verdict for defendant where it appears that the broker originally approached the owner at the suggestion of the prospective purchaser for the sole purpose of getting the property for the latter; that without disclosing the name of the purchaser to the owner he made an offer for the property at the price named by the purchaser which was less than that fixed by the owner, which offer the owner refused; that his explanation of his many subsequent visits to the owner which resulted in a contract of sale at the original price fixed was that he was trying to get the property for the purchaser; that, accepting his statement as true that the owner employed him to act as his agent and promised to pay him a commission, he tried to induce the owner to reduce the price in the interest of the purchaser, and that, according to his own statement, he was trying to get the property as cheap as he could for the buyer. *Harten v. Loffler*, 31 App. D. C. 362. See also Sec. 314.

Sec. 1047. Instruction erroneous, that jury could not consider that defendant was surety on plaintiff's note.

An instruction, in an action for a real estate broker's commissions, that the jury in arriving at a verdict could not consider testimony that defendant went on plaintiff's note as surety, or that defendant had been sued on the note, was erroneous, the testimony being relevant to the issue as to the terms of the contract between the parties. *Yates v. Brattam* (Tex. Civ. App. '08), 111 S. W. 416.

Sec. 1047a. Court upheld in peremptorily instructing jury to find for defendant.

Appellants, real estate agents, hearing that appellee, who was absent from the State, wished to sell his farm, wrote to him that they had a purchaser for it, asking him to fix his lowest price and allowing commissions. Appellee wrote, naming \$225 per acre as his lowest net price, and saying "whatever your price is for selling must be added to this." There was no other correspondence and nothing further was ever said by appellants to appellee as to the sale of the farm. Four months after the passing of the letters appellee sold the farm for \$200 an acre to a person with whom appellants were negotiating for its sale, but with whom they never made any contract. In this action by appellants against appellee to recover commissions for making the sale. *Held*, that upon proof of the facts stated the court did not err in giving peremptory instructions for defendant; as appellants did not show that they ever procured a purchaser on the terms named, or by the wrongful act of appellee to have been prevented from doing so, they can not recover. *Hobbs v. Miller*, 14 Ky. L. R. (abst.), 719. Compare Sec. 446.

Sec. 1047b. Instruction that sale by defendant was made on day prior to sale by plaintiff, upheld.

Before plaintiff reported a sale of the property, defendant, on the ninth day of the month, through another agency, signed a written agreement for a sale of the property for the agreed consideration, \$1,000 to be paid in cash on delivery of the agreement and the balance on delivery of the deed, with abstract

showing good title. The vendee almost immediately accepted the proposition in writing and notice was immediately given to defendant of the sale, but by agreement the payment of the \$1,000 was deferred until the next morning. At about nine o'clock on the tenth, plaintiff sold the property and received part payment therefor from another person. The vendee under the first contract met defendant at the appointed hour and just as the deal was being completed plaintiff appeared with his purchaser, and was then, for the first time, informed of the prior sale. Defendant, in an action on the contract, testified that the agent through whom the sale was made which the defendant accepted, found the purchaser and sold the property before the plaintiff made a sale. *Held*, that the sale which was accepted by defendant was made on the day prior to the sale by plaintiff, and an instruction to that effect was correct. *Tuffree v. Bienford*, 130 Iowa, 532, 107 N. W. 425.

Sec. 1047c. Charge proper that unless jury find contract made on day alleged must find for defendant.

Where, in an action by a broker for commissions for a sale of land, the petition declared on a verbal contract made on a certain day, and specifically set forth the terms of the agreement and its performance by plaintiff, an instruction that unless the jury believe that defendant expressly employed plaintiff on the day named as his agent to sell the land, they should find for defendant was proper. *Fortran v. Stowers* (Tex. Civ. App. '08), 113 S. W. 631. Compare Sec. 887.

Sec. 1047d. Modification of instruction held to be proper.

In an action for broker's commissions, an instruction that "merely procuring a purchaser to enter into a contract for the purchase of property does not entitle a broker to commissions, unless such persons are ready, willing and able to make the payments * * * named in the contract," was properly modified by adding, "unless the seller accepted the purchaser." *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974.

CHAPTER XVII.

SECTION.

1048-1053. Findings by the court.

1054-1064. Verdicts.

1065-1071. Judgments.

Sec. 1048. Finding that there was no failure of consideration was proper.

Defendants executed two notes for \$385 in payment of a commission for selling land, and payable only in the event that the vendees of the land remained on it for one year and made improvements equal in value to the notes; the vendees plowed one hundred acres of land, which increased its value \$2.50 per acre, erected buildings, and constructed drainage worth \$75, and a levee worth \$64; but, with the consent of the defendants, to whom they executed a reconveyance, abandoned the premises before the expiration of a year. *Held*, that a finding that there was no failure of consideration for the notes, was proper. *Easton Packing Co. v. Kennedy*, 131 Cal. xviii, 63 P. 130.

Sec. 1049. Finding that there was no agreement to pay plaintiff five per cent. commission was proper.

In an action by a broker for services, the complaint was on a *quantum meruit*, alleging performance of services reasonably worth a certain sum; the evidence showed that plaintiff, in a conversation between himself and defendant, had stated that his commission rate was five per cent., but nothing further was said either at that time or at the time of the plaintiff's employment by the defendant with reference to commissions; commissions in general were shown to vary from three to five per cent. depending upon the amount involved and the circumstances. *Held*, that a finding that there was no agreement to pay plaintiff a five per cent. commission was proper. *Burden v. Briquillet*, 125 Wis. 341, 104 N. W. 83.

Sec. 1050. Finding for plaintiff on one count, finding against him on the other.

In an action by a real estate broker for commissions, the court's finding for plaintiff on the count of his complaint relying on an express contract was, in effect, a finding against him on the count on a *quantum meruit*. *Willard v. Carrigan*, 8 Ariz. 70, 68 P. 538.

Sec. 1051. Finding that plaintiff kept back part of the loan equal to amount of two mortgages was error.

Defendant applied to a real estate agent for a mortgage loan. Three unsatisfied mortgages were to be paid with the proceeds of the loan; plaintiff agreed with the agent to make the loan, and gave the agent a check for the amount, taking a mortgage on the property, the agent assuring him that he would search the title and see that plaintiff had a first mortgage, but not informing him of the outstanding incumbrances; on execution of the mortgage, defendant instructed the agent to pay off the three outstanding mortgages with a part of the money in his possession; the agent paid off one of the three mortgages only, and appropriated the rest of the money. *Held*, that the payment of the amount of the loan to the agent was a payment to him as agent of the defendant, and a finding that plaintiff had kept back a part of the loan equal to the amount of the two mortgages was error. *Henker v. Schwicker*, 174 N. Y. 298, 66 N. E. 971; affirming 73 N. Y. S. 656, 67 A. D. 196. See also Sec. 269.

Sec. 1052. Finding did not entitle plaintiff to recover.

In an action for commissions for selling land, the court found that plaintiff sold a lot and was paid his commissions; that the other lots were sold by defendants to B. who sold them to R. and that R. paid plaintiff a commission therefor; that at R.'s request, as a matter of convenience, for certain reasons, B. conveyed the lots back to defendant, who then conveyed them to R., but defendant in nowise made itself responsible to plaintiff for any commissions on the sale. *Held*, that under the finding plaintiff was not entitled to recover. *Fortran v. South End Land Co.* (Tex. Civ. App. '07), 105 S. W. 323.

Sec. 1052a. Finding by the court not sustained by the evidence.

In an action to recover commissions earned by the sale of real estate, it appeared that the owner gave the proposed purchaser an option to purchase the land if the holder of a prior existing option failed to purchase. The sale was made to a party not named in the first option, but who claimed the right to purchase thereunder. *Held*, in an action to recover commissions for procuring a person ready to buy under the second option, that the finding that the party to whom the sale was in fact made was not entitled to purchase under the first option was not sustained by the evidence. *Frye v. Wakefield*, 107 Minn. 291, 120 N. W. 35.

Sec. 1053. Finding that broker acted for defendant was proper.

In an action for deceit arising out of an exchange of property, through a broker's acting for defendant, evidence that defendant stated that his broker made a mean trade for him, and that he had made a poor trade, warrants a finding that such broker was acting for defendant in effecting the exchange. *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413.

Sec. 1053a. Erroneous finding that defendant was indebted to plaintiff.

A finding by the court, under a count for four per cent. commission for procuring a loan of \$8,000 on a first mortgage; that defendant agreed to pay such commission; that plaintiff unsuccessfully negotiated with a member of a firm for the loan; that plaintiff introduced defendant to such partner, and that thereafter, without plaintiff's knowledge, defendant procured from such partner a loan of \$2,000 of his individual funds on a second mortgage, will not support a conclusion of law that defendant was indebted to plaintiff for \$80, "being a commission of four per cent. on \$2,000." *Diltz v. Spahr*, 16 Ind. App. 591, 45 N. E. 1066.

Sec. 1053b. Evidence held insufficient to show ability of purchaser to pay for property purchased.

Where a broker sues for commissions for procuring a purchaser able to purchase on defendant's terms, one of which was a cash payment of \$25,000, evidence that the purchaser's assets consisted of a stock of groceries, the value of which is not known, and a cause of action against third parties for \$10,000 or \$12,000, for money loaned, and that he has no funds in his possession; *Held*, insufficient to show the purchaser's ability to pay \$25,000 cash. *Schnitzer v. Price*, 106 N. Y. S. 767, 122 App. Div. 409. See also Sec. 157.

Sec. 1054. In an action for compensation, verdict on conflicting evidence usually upheld.

There being a conflict of evidence the question is exclusively for the jury, and a finding will not be disturbed on appeal. *Mousseau v. Dorsett*, 80 Ga. 566, 5 S. E. 780; *Semple v. Rand*, 112 Iowa 616, 84 N. W. 683; *Hall v. Grace*, 179 Mass. 400, 60 N. E. 932; *Holschien v. Fehleg*, 55 Mo. App. 375; *Sherwin v. O'Connor*, 24 Neb. 603, 39 N. W. 620; *Abraham v. Burstein*, 178 N. Y. 586, 70 N. E. 1094; *Smith v. Cutter*, 66 N. Y. S. 332, 54 App. Div. 618; *Van Sicler v. Herbst*, 51 N. Y. S. 968, 30 App. Div. 255; *Chase v. Veal*, 83 Tex. 333, 18 S. W. 597.

Sec. 1055. Verdict must be palpably against weight of evidence to warrant setting aside.

A judgment by the trial court to which the law and facts are submitted will be treated on appeal as the verdict of a properly instructed jury and will not be reversed unless palpably against the weight of the evidence. *Summers v. Summers*, 26 Ky. L. R. 179, 80 S. W. 1154; *Gallagher v. Bell*, 89 Minn. 291, 94 N.W. 867; *Fish v. Calvin*, 2 Silver. (N. Y. Supreme) 450, 6 N. Y. S. 64; *Ross v. Decker*, 68 N. Y. S. 790, 34 Misc. 168; *Holland v. Howard*, 105 Ala. 538, 17 S. 35; *Loeb v. Teppee*, 112 N. Y. S. 1043.

Sec. 1055a. Answer made by the court to a juror held not to constitute error to set aside verdict.

In an action to recover commissions on a sale or exchange of real estate, the defendant both admitted that the agreement

had been made and averred that it was conditional only, and was not to be carried out if the defendant needed the money provided by the agreement for a mining enterprise in which he was interested. He testified that the money was needed in the enterprise, and that the agreement was never carried out. The evidence showed that nothing was said about money when the negotiations commenced, nor when the property was placed in the hands of the plaintiff for sale. At the trial, a juror asked whether there was "any evidence that there was anything said about money when they entered into this proceeding?" to which the court replied: "Nothing was said about money. I will leave to you the whole case, whether there was any understanding as to the payment of money or not, or that the defendant could finally withdraw the proposition when he got ready." *Held*, that the answer of the court was not ground for reversal of the verdict and judgment for plaintiff. *Mitchell v. Edeburn*, 37 Pa. Super. Ct., 223.

Sec. 1056. Verdict not set aside because if for adverse party it would have been sustained.

"The evidence is indeed so strong in defendant's behalf that had the verdict been for him no one would have thought of questioning it," but that does not justify setting it aside; *Veale v. Greene*, 105 Mo. App. 182, 79 S. W. 731; nor where the evidence is conflicting does the fact that the appellate court might have reached a different conclusion. *Brand v. Merritt*, 15 Colo. 286, 25 P. 175.

Sec. 1057. Verdict not disturbed on account of evidence of ratification.

In an action by a real estate broker to recover commissions, it appeared that defendant's husband had an interview with plaintiff in regard to the sale of her land, and that subsequently, in response to a letter from plaintiff the husband called at his office, and was introduced to T., who later showed defendant and her husband land that he wished to exchange, but it did not suit defendant; afterward, she accepted another offer made by T. to buy the land; on the trial, defendant and her husband attempted to suppress their own testimony, and their conduct

justified a belief that defendant had authorized or ratified her husband's act. *Held*, that a verdict for plaintiff would not be disturbed. *Sims v. Rockwell*, 156 Mass. 372, 31 N. E. 484.

Sec. 1058. Verdict set aside, where loan was refused because interest was too high.

A verdict for plaintiff will be set aside as against the weight of the evidence where, on the issue whether defendant agreed to pay six per cent. interest for a loan, so as to render him liable to plaintiff for procuring a person ready to make the loan at that price, defendant testified that he did not agree to pay six per cent., and his testimony was contradicted only by the agent through whom the loan was made, who testified to a conversation with defendant about the loan, and stated that the rate of interest was to be six per cent., but stated no conversation to that effect, and testified that he wrote defendant the next day that he would make the loan at six per cent.; that defendant at once refused, because the interest was too high, and that he told plaintiff that he (defendant) refused the loan when the question of interest was broached, since it is apparent that the statement that six per cent. was to be paid was merely an inference by the witness. *Crandall v. Philips*, 43 N. Y. S. 299, 13 App. Div. 118.

Sec. 1059. Verdict not directed for plaintiff, where customer was not of restricted class.

Where the evidence of plaintiff, suing to recover commissions for procuring a purchaser for defendant's land, of itself makes out a case, the court will not direct a verdict in his favor, if the evidence of the defendant shows that under the contract plaintiff was restricted to negotiate a sale with certain persons, and the one procured by him did not belong to that class. *Meyer v. Strauss*, 58 N. Y. S. 904, 42 App. Div. 613.

Sec. 1060. Verdict for commissions not supported, where sale varied from authorization.

Defendant agreed to pay plaintiff \$100 to find a purchaser for a farm at \$2,400, the purchaser to receive one-third of the crops; defendant procured a purchaser who agreed to pay \$2,400

for the land and the landlord's share of the crops; there was no evidence as to what constituted the landlord's share of the crops, or of the purchaser's ability to pay. *Held*, that the evidence was not sufficient to support a verdict for his commissions. *Howie v. Bratrud*, 14 S. Dak. 648, 86 N. W. 747; *Haskell v. Beighly* (Kans. Sup. '08), 96 P. 134.

Sec. 1061. Verdict directed for defendant erroneous, when not justified in believing broker recreant.

Defendant wrote plaintiff authorizing him to sell defendant's timber land in Arkansas, agreeing that if plaintiff put defendant in communication with a reliable purchaser defendant would protect plaintiff on a commission of five per cent.; plaintiff immediately corresponded with a purchaser who, at plaintiff's direction, wired defendant for the price, and this being agreed on, the purchaser wrote plaintiff a letter concerning the property, enclosing a skeleton option, which he desired defendant to execute; plaintiff then went to defendant's place of business and showed him the purchaser's letter with the option, and defendant, after some delay, signed the option, after inserting that the price should be net cash to him, but without any statement that it was to be free of commissions. *Held*, that defendant was not justified in believing that plaintiff was acting for the purchaser, and that it was, therefore, error for the court to direct a verdict for defendant in plaintiff's action for commissions. *Love v. Scatterd*, 146 Fed. 1, 77 C. C. A. 1.

Sec. 1062. Verdict for broker not sustained by inviting attention of public to land and negotiating.

In an action for commissions for the sale of land, evidence that plaintiff invited the attention of the public to the property, and used time in active negotiations for its purchase, and that the final purchase resulted from a continuation of the pre-existing negotiations, unaffected by the broker's acts, was insufficient to sustain a verdict for plaintiff. *Sexton v. Goodrich*, 131 Wis. 146, 111 N. W. 206.

Sec. 1063. Awarding less than plaintiff entitled to, styled a "Sancho Panza" verdict.

Plaintiff was employed by defendant B. to sell 640 acres of land for \$15 an acre cash to B. and as much more to plaintiff as

he could get; plaintiff induced defendant M. to purchase for \$19.50 per acre, and to deposit such amount subject to a tender of title; it was thereafter discovered that B. could only convey 538 acres, whereupon, in order to consummate the deal, it was arranged that a sale of this amount should be made at \$15 an acre, and that the purchaser should pay plaintiff \$300, and that B. should pay plaintiff \$600, to which plaintiff agreed; it was subsequently discovered that B.'s title was good only to 338 acres, which were conveyed. *Held*, that the agreement by both the owner and the purchaser to pay such amount to plaintiff was based on sufficient consideration, and that plaintiff was entitled to recover on such contract and not on a *quantum meruit*. "The case was given to the jury without a charge; this, perhaps, accounts for the Sancho Panza verdict they returned." *Brunson v. Blair*, 44 Tex. Civ. App. 43, 97 S. W. 337.

Sec. 1064. Verdict properly directed for defendant where the plaintiff violated his authority.

In an action to recover real estate brokers' commissions, the plaintiffs' right to go to the jury depended upon whether their evidence tended to show that they procured a purchaser ready, able and willing to buy their principal's land, at a price and upon terms which they were authorized to make, and there being no evidence that they were authorized to agree to pay the purchaser \$50 a day as liquidated damages for a breach of the contract to convey, and to secure the same by a lien on the land, or that the proposed purchaser would have taken the lands without such agreement, a verdict was properly directed for defendant. *Evarts v. Fuqua* (Tex. Civ. App. '08), 111 S. W. 675; affirmed 118 S. W. 132.

Sec. 1065. Judgment unjustifiable ought to be set aside.

Where the judgment cannot be justified upon any hypothesis presented by the pleadings or evidence it ought to be set aside. Also, where not sustained by the evidence, being excessive. *Hammers v. Merrick*, 42 Kan. 32, 21 P. 783; *Wulhart v. Weinstein*, 91 N. Y. S. 359.

Sec. 1065a. Reduction by the court of an excessive verdict.

Defendants agreed that if plaintiffs would procure purchasers for lands, defendants would pay them fifty cents an acre for their services. Plaintiffs procured purchasers for 3,360 acres, to be thereafter selected; but, owing to the fact that defendants did not own or control the lands as represented, the transaction failed. *Held*, that a verdict of \$1,680 for plaintiffs was excessive, and should be reduced to \$1,200, as it was not certain that all of the purchasers would have made selections and purchased the lands for which they subscribed. *Peavey v. Greer* (Minn. Sup. '09), 121 N. W. 875.

Sec. 1066. Judgment of appellate court conclusive.

In an action for commissions for services as broker, the amount which the plaintiff is entitled to recover is a question of fact, on which the judgment of the appellate court is conclusive. *Smith v. Mayfield*, 163 Ill. 447; 45 N. E. 157.

Sec. 1067. Judgment not reversed for improper evidence.

A judgment in favor of a real estate agent on a contract to pay a definite sum as a commission will not be reversed because the trial court permitted him to introduce evidence that the amount of commissions alleged to be paid was the usual charge of real estate agents in that city for similar services. *Branaman v. Sherman*, 49 Kan. 771, 31 P. 667.

Sec. 1068. In an action on a judgment error to submit to jury whether agent could release.

A loan broker acted as agent for both parties in the negotiation of a loan, which was to be secured by a trust deed of land encumbered by judgments; the amount of the loan was sent to him by the lender with instructions to see that the amount required by the terms of the deed be applied to secure a release of this judgment by the original judgment creditor; a transfer of it to him by the present holder was so applied; the agent at first, being unable to obtain a release, took a transfer of the judgment, and afterwards obtained a release, which he forwarded to the lender; the transaction was completed, and sub-

sequently, at the request of the borrower, and without any further instructions from the lender, the agent entered on the margin of the judgment record a receipt in full for the judgment. *Held*, that an instruction, in an action to obtain execution under the judgment, and submitting the question whether the agent was authorized to execute satisfaction of the judgment, was improper. *Brown v. Dennis* (Tex. Civ. App. '95), 30 S. W. 272.

Sec. 1069. Judgments unsustained by the evidence.

In an action for commissions for effecting the sale of a house, it appeared that defendant agreed to give plaintiff \$75 if he should sell the house for \$500 by a certain day, \$50 if he sold it for \$400 after that day; plaintiff introduced to defendant a purchaser who, after the day specified, purchased the house for \$350. *Held*, that a judgment for plaintiff for \$35 was not sustained by the evidence. *Blackwell v. Adams*, 28 Mo. App. 61; *Jones v. Pendleton*, 134 Mich. 460; 96 N. W. 574.

In an action brought to recover commissions alleged to have been earned by the plaintiff on a sale of real estate of defendant for military purposes to the government, through his agency, the only evidence of his assistance in the sale was that he, to some extent, helped to intensify public opinion as to the expediency of having a military force in the neighborhood. *Held*, that a verdict for him should be set aside. *Com'l. Nat. Bk. v. Hawkins*, 35 Ill. App. 463.

Sec. 1070. Judgment for a smaller amount, when it will not be interfered with.

Where an action was brought to recover commissions for effecting a sale of real estate, and the testimony shows that the broker merely procured a purchaser who purchased the premises from the owner, *Held*, that a judgment awarding the broker a less sum than the commissions upon a completed sale will not be set aside. *Gregg v. Loomis*, 22 Neb. 174, 34 N. W. 355. Compare, *Brunson v. Blair*, 44 Tex. Civ. App. 43, 97 S. W. 337.

Plaintiff sued to recover commissions for obtaining a loan for defendant, and testified that defendant agreed to pay one and one-half per cent. and disbursements; on cross-examination he

testified that he told defendant the lawyer's charges would be one per cent. and disbursements, and that the plaintiff's charge would be two and one-half per cent., and that defendant agreed to pay it. *Held*, that a judgment for only one-half per cent. was supported by the evidence, since there was no evidence that defendant promised to pay the plaintiff the attorney's charges, or that plaintiff had promised to pay such amount to the attorney. *Robert v. Sire*, 67 N. Y. S. 860, 33 Misc. 755. See also Sec. 572.

Sec. 1071. Judgment for full amount error, where loan failed through defective title.

Where an agreement was made to pay plaintiff \$800 if he secured a certain loan for defendant on its property, which sum was to cover all fees, lawyer's charges, disbursements, etc., it was error to grant a judgment for the full amount, where performance was prevented by reason of defendant's defective title. *Gatling v. Central Spar Verein*, 73 N. Y. S. 496, 67 App. Div. 50. See also Sec. 572.

Sec. 1071a. Effect of a judgment as barring further proceedings.

A judgment dismissing an action on an express promise to pay an agreed commission for selling land, entered on a finding that plaintiff did not act as agent for defendant in the sale, and that there was no contract for a commission, is a bar to a subsequent action for the same commission based on an express promise to pay the reasonable value of the services after they were performed. *Krug v. Hendricks* (Wash. Sup. '09), 102 P. 1049.

CHAPTER XVIII.

SECTION.

1072-1078. Error.

1079-1131. Judicial constructions and interpretations.

Sec. 1072. Error in sustaining objection of plaintiff to evidence of plaintiff's receipt in settlement.

It was held that the trial court erred when it sustained an objection made by plaintiff's counsel to the introduction in evidence of a stipulation made by the parties in a former suit and filed in court, in which the plaintiff acknowledged the receipt of \$90 in full settlement and payment of all claims and demands arising out of the alleged cause of action. *Davis v. Thomas*, 87 Minn. 301, 91 N. W. 1100.

Sec. 1073. Error to instruct for plaintiff that agent acting for both parties may receive compensation from both

Plaintiff sued for commissions for purchasing property for defendants, on the theory that with defendant's knowledge he was to receive commissions from both defendants and the vendor; plaintiff, however, during the negotiations, had written a letter to defendants stating that if they were under the belief that he expected to receive commissions from both sides, they were mistaken; that if he received a commission from the other side, he would charge defendants only for legal services; on receipt of this letter defendants forwarded the purchase price. Plaintiff testified that the letter was written at the instance of the agent of defendants, who promised him other business from the company sufficient to repay him for the release of commissions. *Held*, that as defendants' agent could not have authority to deceive defendants, and as the jury might have found that defendants acted on the strength of the letter, it was error to instruct for plaintiff; that if an agent acts for both he may receive compensation from both, and that if the letter releasing

commissions was written in consideration of further business, which they refused to give plaintiff, he was entitled to recover. *Lindt v. Schlitz Brewing Co.*, 113 Iowa 200, 84 N. W. 1059. See also Sec. 558.

Sec. 1074. Error to exclude testimony of defendant that he was ignorant of agent's double employment

In an action by a real estate broker to recover commissions on an exchange of property effected by him, it appearing that plaintiff was in the employ of both parties to the exchange, the court erred in excluding the testimony of defendant tending to show that he was ignorant of the double employment of plaintiff, of which plaintiff testified that defendant was informed. *Condit v. Sill*, 18 N. Y. S. 97.

Sec. 1075. In the absence of evidence it was not error to exclude that other party knew agent was paid by defendant.

In an action to recover a broker's commissions for negotiating an exchange of defendant's property for the property of L. & W., where there was no evidence that defendant knew that plaintiff was also to receive commissions from L. & W., it was not error to exclude evidence that L. & W. knew he was to receive commissions from defendant. *Bellin v. Wein*, 104 N. Y. S. 360.

Sec. 1075a. Circumstances showing no error in refusing to grant non-suit.

There being evidence tending to show that the real estate agent had first agreed with another person to procure a purchaser, and that all of them should have an interest in the land and should divide it into lots and sell it for a profit, and that subsequently such third person stated to the real estate agent that the contemplated purchaser who would furnish the money to pay for the land and whose name was not divulged to the agent was unwilling for the agent to be interested in the enterprise, and that thereupon it was agreed between the agent and the person with whom he was dealing, that the latter would pay a certain amount to the former, in consideration and in satisfaction of his commission on relinquishing any further claim of interest,

which he did; in a suit by the agent against the person making such agreement, and others, there was no error relatively to such person in refusing to grant a non-suit or direct a verdict in favor of the defendant. *Mitchell v. Gifford* (Ga. Sup. '10), 67 S. E. 197 (Syllabus.)

Sec. 1075b. Error in awarding verdict to real estate agent.

Relatively to the person who was to be the actual purchaser and pay the purchase money, there was no evidence sufficient to show that he knew or took part in the negotiations with the real estate agent mentioned in the preceding headnote or that he was bound by any promise to pay commissions of the agent, or an amount for the latter's making no claim to be interested in the purchase and development of the property. A verdict against him in behalf of the real estate agent was, therefore, not warranted by the evidence. *Id.*

Sec. 1075c. Corporation exempted from liability for commission.

The same is true of a corporation which was formed by the purchaser and the middleman with whom the real estate agent dealt, some time after the agreement of purchase was made, and which corporation took over the land and improved and sold it. The evidence did not show that any such corporation was organized or in contemplation when the agreement with the real estate agent was claimed to have been made, or that it ever made any promise or did anything to render itself liable to pay commissions to the agent on account of the sale of the land. *Id.*

Sec. 1076. Error to exclude evidence of the value of defendant's property.

On the trial of an action for a broker's commissions on an exchange of property in which the defense was that the defendant had been induced to part with his property by plaintiff's false representations; after plaintiff had been permitted to testify that defendant had told him that his property would not sell for the amount of the mortgage on it, and also that in plain-

tiff's opinion, defendant's property was worth less than that exchanged for it, defendant attempted to prove the value of his property, but the evidence was excluded; the court afterward, on plaintiff's request, charged that if defendant did not rely on any false representations made, plaintiff must recover. *Held*, that the exclusion of the evidence of the value of defendant's property was error. *Walker v. Johnson*, 46 N. Y. S. 864, 21 Misc. 16. See also Sec. 194.

Sec. 1076a. Error to withdraw from the consideration of the jury the number of acres sold.

In an action for the breach of an agreement to permit plaintiff to sell land on commission, where the number of acres in the tract was uncertain, the amount which plaintiff was entitled to recover depending on the number of acres, was for the jury, so that it was error to charge that plaintiff was entitled to recover a certain sum, if they found the contract as alleged. *Jackson v. Stephenson* (Tex. Civ. App. '08), 114 S. W. 848.

Sec. 1077. It is not error to prove by plaintiff that no sale was made.

In an action by a broker to procure a purchaser of real estate for his commissions, it is not error to allow defendant to prove by plaintiff's testimony that no sale of the premises had in fact been made. *Runck v. Dimmick*, 111 S. W. 779 (Tex. Civ. App. '08.)

Sec. 1078. Error to dismiss, where plaintiff employed to secure a purchaser, shows sale to his customer.

Where a broker, suing for commissions, showed that he was employed to procure a purchaser of real estate on terms specified, and that he called the property to the attention of a third person, who examined it, and after conference with the agent of the owner, purchased it on the terms specified, it was error to dismiss the plaintiff at the close of his evidence. *Schubert v. Kaplan*, 109 N. Y. S. 729.

Sec. 1078a. To work a reversal errors in the trial must have been prejudicial.

Error in the trial to work a reversal on review must have been prejudicial to the complaining party. *Rothschild v. Burritt*, 47 Minn. 28, 49 N. W. 393; *Wray v. Carpenter*, 16 Colo. 271, 27 P. 783.

Sec. 1078b. Error to exclude contract of sale.

In an action by a broker for commissions for a sale of defendant's lands, where the evidence shows that defendant when notified of the sale acquiesced in the terms thereof, it was error to exclude the contract authorizing the plaintiff to make the sale, on the ground that the sale was not according to the contract. *Czarnowski v. Holland*, 5 Ariz. 119, 78 P. 890.

Sec. 1078c. No such failure of proof shown as to justify the taking of the case from the jury.

A complaint alleged an authorization to plaintiff to offer certain property for sale, and to be paid ten per cent. on any amounts above \$60,000 realized; that within the time stipulated in the contract plaintiff procured an offer of \$80,000, and advised defendant that more might be procured; that defendant sold the property for more than said offer, whereby plaintiff became entitled, etc., under the written contract admitted by defendant; the broker was entitled to his commissions if a purchaser was procured willing to pay a sum in excess of \$60,000. It was also admitted that plaintiff notified defendant of the offer of \$80,000, that he intimated that more could be secured, and that a sale for a larger amount was subsequently made by defendant to such purchaser; plaintiff, in addition to referring to the written contract, testified that when the arrangement was made the services had been rendered, nothing more being contemplated; that the offer was communicated to and defendant advised what the purchasers were willing to pay; that the money demanded was for information given. *Held*, not such a failure of proof of the cause of action set out in the complaint as to justify the taking of the case from the jury. *Geoghegan v. Chatterton*, 99 N. Y. S. 702, 113 App. Div. 835.

Sec. 1078d. Evidence on question of abandonment improperly excluded.

In an action for commissions by real estate brokers, where the defense was that defendants had cancelled plaintiffs' employment before the sale, testimony whether a proposition received after the alleged abandonment was more or less favorable than the original one, was competent on the question of abandonment, and was improperly excluded. *Young v. Hubbard*, 154 Mich. 218, 117 N. W. 632, 15 D. L. N. 725.

Sec. 1078e. Error to charge that broker would not be entitled to recover unless broker procured increased price.

In an action by a broker to recover his commissions, where the broker testifies that the defendant, the owner, after authorizing him to sell the property at a certain price, in a later interview fixed a greater net price, it is error for the court to charge the jury that according to defendant's contention the plaintiff would not be entitled to recover unless he had found a purchaser willing to pay such larger net price. *Sechrist v. Atkinson*, 31 App. D. C. 1.

Sec. 1079. When judicial construction will not be placed solely on correspondence.

The defendant had no right to demand that correspondence be given a judicial construction alone, where some of the letters and the defendant's endorsements thereon referred to telephonic conversations between the parties in relation to the subject-matter in issue. *Beach v. Traveler's Insurance Co.*, 73 Conn. 118, 46 A. 867.

Sec. 1080. The question of what constitutes a reasonable time.

What constitutes a reasonable time is a question for the court. *Id.* In other jurisdictions it is considered a question of fact, to be determined by the jury, on evidence of the steps necessary to be taken. *Dent v. Powell*, 80 Iowa, 456, 45 N. W. 772; *Hurst v. Williams*, 31 Ky. L. R. 658, 102 S. W. 1176; *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509.

Sec. 1081. Construction of commission contract.

Where a contract for commissions on a sale of real estate provided for its payment as soon as the purchaser had made payment of the balance due after the payment made at the time the contract was executed, no commission was payable until after the land was paid for, and in construing the commission contract, the contract as to the sale of the land, so far as it related to the purchase price, should be construed with it. *Robertson v. Vasey*, 125 Iowa, 526, 101 N. W. 271.

Sec. 1082. Construction of employment to negotiate a lease.

In an action for commissions for the sale of a lease, in a petition which alleged that defendant authorized plaintiff to negotiate a sale, the word "negotiate" should be construed to mean conversations in arranging the terms of a contract. *Northrup v. Diggs*, 128 Mo. App. 217, 106 S. W. 1123.

Sec. 1083. Contract construed to be that of agency and not an option.

A writing in express terms empowering and authorizing real estate brokers to sell land for \$1,000, or as much less as the owner might take, binding the brokers to accept as remuneration any sum they might obtain in excess of the sum stipulated that the owner should receive, was a contract of agency and not an option to the brokers to purchase the land. *Tate v. Aitken*, 5 Cal. App. 505, 90 P. 836.

Sec. 1084. Exclusive contract construed not to entitle broker to commissions on owner making contract with second broker.

Where one has charge of real estate under an exclusive agency for its sale, and as a part of his compensation is to receive a percentage of the price for which it is sold, no matter to whom, a contract by the owner granting to a third person the right to sell and retain all the proceeds over a certain price, is not a sale in such a sense as to entitle the original agent to the specified percentage. *Kirschner v. Brown* (Kan. Sup. '08), 96 P. 848.

Sec. 1085. The word "taxes" construed not to include street assessments.

Where a contract with brokers for the sale of land required defendant to furnish a certificate of title showing the property clear of any incumbrances, except " * * * taxes assessed but not due and payable," defendant was not bound to clear the property from all street assessments, the word "taxes" being ordinarily used to refer only to taxes assessed for state, county, or city purposes, and not to describe street assessments for public improvements. *Alderson v. Houston*, 96 P. 884, 154 Cal. 1.

Sec. 1086. The word "divide" construed to mean into equal parts.

A complaint in an action by a broker for commissions, which alleged that plaintiff was employed to assist in making a sale, that defendant promised to pay plaintiff for his services a half of the commissions received on a sale being made, that a sale was made through the services of plaintiff, and that defendant received a specified sum for commissions, is supported by evidence that defendant agreed to "divide" the commissions with plaintiff, the word "divide" in common parlance, meaning when used by two contracting parties, severance or partition into equal parts. *Graves v. White*, 43 Colo. 131, 95 P. 347

Sec. 1087. Instrument held to be a contract of sale and not in itself a sale.

Where S. & N. make a contract about the conveyance of a farm by S. to N. who pays a certain sum in cash, and agrees to pay a further sum at a future time, and execute a mortgage for the balance of the purchase price, at which time S. agrees to make a deed to the farm, giving possession of the same; and at the same time it is further agreed that if N. fails to pay the further sum of money and to execute the mortgage, then the money paid shall be forfeited to S; *Held*, that such an instrument is a contract of sale, and not a sale itself. *Stewart v. Fowler*, 37 Kan. 677, 15 P. 918.

Sec. 1088. Contract construed as that of agency and not employment as mere middlemen.

A contract placing property in the hands of real estate agents for sale or exchange, the owner reserving an option as to whether it should be sold or exchanged, expressly agreeing to give the agents all the assistance in his power in the transaction, confers upon the agents authority to negotiate, and does not constitute them mere middlemen to bring the parties together. *Scribner v. Collar*, 40 Mich. 275.

Sec. 1089. Broker's contract construed as absolute promise to pay price of land if not sold within a year.

After agreeing to sell land belonging to plaintiff for \$12,000 within one year, defendant agreed to account for the proceeds of sale of said premises, whenever prior to the expiration of said twelve months, he should effect a sale of said premises. *Held*, that this was not an agreement to pay only on condition that a sale was made, but was an absolute promise to pay within a year, and to pay before the end of a year if a sale should be sooner effected. *Dunn v. Mackey*, 80 Cal. 104.

Sec. 1090. Remark of principal held not to destroy broker's ability to sell at price stipulated.

Plaintiff's assignor was authorized to sell defendants' manufactory for \$125,000. He found parties willing to take a lease of it for six months, with privilege to purchase it for the price stated. Defendants stated to one M. about the same time that they would be glad if a purchaser could be found at \$100,000, but it did not appear that this remark ever reached the proposed lessees, or any intending purchaser. There was no evidence that the property had a market value of \$125,000, except the above proposal of lease. *Held*, that defendants' statement did not destroy the market at \$125,000, so as to entitle plaintiff's assignor to the commissions he would have made in case of sale. *Barkley v. Olcott*, 5 N. Y. S. 525.

Sec. 1091. Broker under a general employment held not entitled to extra compensation for drawing lease.

In an action for a broker's commission for drawing leases of his principals' property, it was shown that he had a power of

attorney to collect rents and execute leases to their property for a compensation of five per cent., and he admitted that he had charge of the property concerned in the action on the same terms. It was shown that he collected the rents and retained a commission of five per cent. *Held*, that a verdict for defendants was properly directed. *Fish v. Hodsdon*, 16 N. Y. S. 92.

Sec. 1092. Contract held not invalid because of lack of consideration, absence of mutuality or want of definite term of existence.

A contract between a land company and real estate agents, whereby the latter agreed to sell the town lots of the company at a certain town, for such prices as might be deemed just, and the company agreed to pay the agents ten per cent. on all sales, and to set apart certain lots for advertising purposes, etc., was not invalid for lack of consideration, absence of mutuality, or want of definite term of existence. *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158; *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Norman v. Hopper*, 38 Wash. 415, 80 P. 551.

Sec. 1093. Statute restricting broker's fee for securing loan applicable, when suit brought to enforce after change made.

1 Rev. St., p. 709, restricting brokers' fees for negotiating loans to one-half of one per cent. on the amount loaned, applies to a contract for a loan procured while such statute was in force, although not sought to be enforced until after the statute was changed. *Anderson v. Dwyer*, 63 N. Y. S. 201, 30 Misc. 793.

Sec. 1094. Broker entitled to ten per cent. on excess above \$60,000.

A contract stipulated that the broker was "authorized to offer" certain property for sale, and in lieu of the usual brokerage "you are offered ten per cent. on the excess above \$60,000." *Held*, that if the broker procured a purchaser willing to pay a sum in excess of \$60,000, he was entitled to ten per cent. on the amount accepted by the owners in excess of \$60,000. *Geoghegan v. Chatterton*, 99 N. Y. S. 702, 113 App. Div. 835.

Sec. 1095. Broker held entitled to remaining commissions from proceeds of sale of corporate stock.

In an action by a broker to recover commissions on a sale of realty, the evidence showed that defendant agreed to pay \$20,000 commissions on the sale of certain coal lands, and that plaintiff secured a purchaser, and that the land was sold and the consideration received in corporate stock. Defendant agreed that on the sale of the stock he would pay one-fourth of the proceeds of every sale made by him until the \$20,000 was paid; after several sales defendant sold for a reduced sum the balance of the stock which he had received, having paid plaintiff his proportion of previous sales. *Held*, that plaintiff was entitled to recover out of the sum paid for the balance whatever was due him of the \$20,000. *Ryan v. Starr*, 214 Pa. St. 318, 63 A. 704.

Sec. 1096. Broker refusing to carry out contract of substitution denied recovery of commissions.

Where a real estate broker agreed with a prospective tenant, and executed a receipt in full for his commissions, in order to enable the tenant to procure a lease, and to accept from the tenant stock and bonds of a corporation which the tenant was to organize as payment for his commissions, but refused to carry out such agreement, he could not, irrespective of the question of novation, recover his commissions from the principal. *Davis v. True*, 85 N. Y. S. 843, 89 App. Div. 319.

Sec. 1097. Objection to question held properly sustained.

In an action by a loan broker against a client who had refused to take the loan after a lender had been secured, the defendant testified that he told the lender's attorney that he would not complete the loan until he had arranged to pay an existing mortgage before maturity, and a day or so later he told him that he had notified the mortgagee that the negotiations pending for the paying off of his loan had terminated. He was then asked, "What caused the making of that statement? What transpired between you and plaintiff that led you to make that statement to the mortgagee, that the transaction had terminated?" Defendant had testified fully as to his conversation with plaintiff. *Held*,

that the objection to the question was properly sustained. *Payne v. Williams*, 178 N. Y. 589, 70 N. E. 1104.

Sec. 1098. Evidence held not to show that broker so acted in the interest of tenant as to defeat right to commissions.

Defendant entrusted to plaintiffs the leasing of certain property, offering to erect a building thereon for the tenant under a long lease. Other parties had come to plaintiffs to find them a building suitable for their purpose. Plaintiffs brought these parties and defendant together; the matter was discussed and an arrangement for a twenty years' lease effected, the contract being drawn by plaintiffs; difficulties occurred in the arrangements, owing to the necessity of a fireproof building, and an increased rental to which the proposed tenants objected; but this difficulty was bridged over by the plaintiffs' efforts, who were in telegraphic communication with defendant. *Held*, that the evidence did not show that plaintiffs were acting to such an extent in the interest of the tenants, as well as in the interest of the defendant, as to preclude the recovery of commissions. *Rutledge v. Neely*, 99 Mo. App. 384, 73 S. W. 359.

Sec. 1099. Special finding of jury that plaintiff was procuring cause of sale construed not to entitle to commissions.

In an action for a broker's commissions, the jury specially found that plaintiff was the procuring cause of the sale by the owner to the purchaser; but also found that plaintiff, before the sale, had released defendant from the obligation to pay any commissions in case he sold the farm himself, and that defendant relied on such releases in selling the farm. *Held*, that a finding that plaintiff was the procuring cause of the sale only meant that plaintiff drew the purchaser's attention to the farm, and did not constitute a finding that the sale was in fact made by plaintiff and not by the owner, so as to entitle plaintiff to commissions, notwithstanding the release. *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320, 96 N. W. 833

Sec. 1100. Contract held not in violation of U. S. land laws.

A contract whereby a party holding a homestead entry of government land, on which are certain improvements, agrees with

another party to pay him a certain per cent. commission if he will find a purchaser for such land, and such party does find such purchaser, who pays a certain stipulated sum to the homestead entryman, who releases his homestead entry, and the other party files thereon, is not void as in violation of the land laws of the United States. *Hoyle v. Johnson*, 18 Okla. 330, 89 P. 1119.

Sec. 1101. Extension of time should be pleaded in order to justify evidence thereof.

Where time was of the essence of a broker's contract for the sale of land, an extension of time should be pleaded in order to justify evidence thereof and its submission to the jury. *Leuschner v. Patrick* (Tex. Civ. App. '07), 103 S. W. 664.

Sec. 1102. Contract construed to authorize sale at \$1,700 gross.

Where agents wrote the owner of a lot submitting offer of \$1,500, less commissions, and the owner replied that he thought \$1,700 a fair price, and that it would be acceptable to him, the agents were authorized to sell for \$1,700 gross. *Campbell v. Lombardo*, 44 S. 362, 153 Ala. 489.

Sec. 1103. Contract limited to one-half the net profits on lots sold.

Under a contract of appointment as exclusive agent for six months to sell and manage lots, agents to receive one-half the net profits, the agents are limited to one-half the net profits on sales made during the six months, and are not entitled to receive one-half the net profits on sales thereafter made. *Title Ins. & Trust Co. v. Grider*, 152 Cal. 746, 94 P. 601.

Sec. 1104. Construction of contract where broker was to receive one-half the net profits.

Under a contract whereby the parties agreed to put in cement sidewalks, build stone pillars, and write all advertiseemnts, in consideration of their appointment as exclusive agents to sell lands, "all of the above to be paid for by" such parties, they to receive one-half the net profits, the expense of putting in cement walks, etc., must be paid by such parties, and they are

not entitled to have the same paid out of the proceeds of sales.
Id

Sec. 1105. Construction against right of claimants to commissions.

In a controversy between rival claimants for commissions upon a sale of real estate, where there is no dispute that a certain person holds the title and paid the purchase price, and nothing to show that the purchase by such person was a mere pretense to cover a sale to the brokers who ostensibly produced him, the presumption must be that he was a *bona fide* purchaser, and that the only parties entitled to commissions are those who produced him, and the mere fact that such parties may have accepted commissions from him does not increase the rights of claimants who did not produce him. *Shapiro v. Shapiro*, 110 N. Y. S. 11, 125 App. Div. 608.

Sec. 1106. Agreement construed not to be harsh or unreasonable.

An agreement to pay plaintiff, a real estate broker, \$500 in case a sale was made to one of his customers, in consideration of plaintiff's bringing such customer to inspect defendant's farm, without plaintiff being required to solicit or endeavor to induce the customer to buy, it being plaintiff's intention to show the customers other farms in the neighborhood listed with him for sale, was not harsh or unreasonable. *Lee v. Conrad* (Iowa Sup. '08), 117 N. W. 1096.

Sec. 1107. Contract construed to be an agreement of agency.

Plaintiff, the owner of land, entered into a contract with defendant and his partner, by the terms of which the defendant and his partner were to sink a well on the land, install a pumping plant, and develop water upon the premises, they to pay all the expenses and were to subdivide and sell the premises, in consideration of which they were to have the exclusive handling and sale thereof, and the net proceeds of the sale of the land and crops raised thereon, after first paying plaintiff the first cost of the land, were to be divided equally between plaintiff and defendant's firm. Defendant's firm was given the option

to make such terms of sale as they might deem proper, subject to certain restrictions, and the contract provided that if the property should not be subdivided and sold by defendant's firm at a sooner date, the contract should remain in force for two years, and for such further time as might be agreed upon at the end of that period. *Held*, that the contract was nothing more than an agreement of agency whereby defendant's firm, in consideration of money and services to be given by them, were given the exclusive right to sell the land for a compensation to be measured by the price realized. They had no interest, legal or equitable, in the land; at least, after the expiration of the time limited by the parties. *Hicks v. Post* (154 Cal. 22), 96 P. 878.

Sec. 1108. Contract not being to sell on credit enforceable against principal.

A contract of real estate brokers on their principal's part to sell property for \$35,500, payable \$10,000 in cash, and balance to be arranged to the satisfaction of the owners, is enforceable against the principal, not being an agreement to sell on credit, which the brokers were not authorized to make. *Kemper v. Gans* (87 Ark. 221), 111 S. W. 1123; rehearing denied, 112 S. W. 1087.

Sec. 1109. Contract of agent to sell land not objectionable, though not signed by both parties.

A contract for the sale of lands, made by the owner to a real estate agent, must be construed as like contracts between other parties, and that it provides for deducting from the agreed purchase price a sum designated as "commission" to be allowed by the vendor, does not render it objectionable under the statute making void all contracts between the owner of land and the agent employed to sell the same, not reduced to writing and subscribed by both parties. *Waters v. Phelps* (81 Neb. 674), 116 N. W. 783.

Sec. 1110. Sale of land by owner entitled brokers to compensation, no previous notice of revocation having been given.

Defendant, after authorizing plaintiff and other brokers to sell land, made a contract with a purchaser to convey, in which

it was specified, with plaintiff's consent, that the contract should be void by the other brokers claiming commissions, which they did. The contract as written was marked "void," but at the same time defendant and the purchaser executed another writing identical in terms with the first agreement, except that the provision that it should be void on the other brokers claiming commissions was omitted, the deposit made by the purchaser on execution of the first contract being retained. *Held*, That, though defendant could have annulled the contract when the other brokers claimed commissions, and thus have escaped liability, he did not do so, and that plaintiff was entitled to his commissions, the mere transcribing of the agreement not amounting to a new contract. *Field v. Walford*, 131 Mo. App. 391, 111 S. W. 523.

Sec. 1111. Contract for the benefit of a third person may, under a statute providing therefor, be enforced by him.

Where an owner contracted to convey to any purchaser secured by a broker employed to procure a purchaser, the contract was for the benefit of a purchaser procured by the broker within the provisions of the statute providing therefor, that a contract made for the benefit of a third person may be enforced by him. *Bacon v. Davis* (Cal. App. '08), 98 P. 71.

Sec. 1112. Construction of the word "sold" as used in the contract.

In the absence of a contrary showing, land is sold within a parol contract authorizing a broker to sell land for another, in consideration of a stipulated commission, when the broker produces a purchaser willing and able to comply with the terms of the sale and an agreement is entered into between the purchaser and the vendor which terminates in an actual transfer of the title, or when the agent has performed the services required of him and the vendor and purchaser enter into an enforceable contract; the word "sold" not necessarily meaning that a conveyance must be made, or that the title must pass. *Sanderson v. Wellsford* (Tex. Civ. App. '09), 116 S. W. 382.

Sec. 1113. Distinction between the rules of law applicable to a consummated and an unconsummated contract of sale.

Where the agreement for the sale or exchange of real property has been consummated by an actual execution of a written contract therefor, in the absence of a stipulation to the contrary, the broker's commissions are earned when the contract is signed by the client, and a defect in the title becomes unimportant and constitutes no defense to the payment of commissions; but where it is sought to recover commissions for services rendered in attempting to effect a proposed exchange of real property, which was not carried out, no written contract having been signed between the parties to the exchange, it must be shown that the customer produced was the owner of the property offered for exchange, as well as that after the terms of the exchange had been agreed upon the client refused to carry them out. *Mutchnick v. Davis*, 114 N. Y. S. 997.

Defendant having denied that he ever agreed to exchange the property, the rule that objections to title and to completing a contract for the sale or exchange of real property not specified during the negotiations are deemed to have been waived does not apply. *Id.*

Sec. 1114. Construction of contract between brokers for commissions.

Plaintiffs agreed with defendant to assist him in procuring for sale on commission lands in H. County, and in making sales for defendant plaintiffs were to receive one dollar an acre on the land previously listed by defendant, and one-half of the commissions on the sale of any lands subsequently listed by either of the parties. *Held*, that, if either of the plaintiffs rendered any assistance in listing land that was subsequently sold by either plaintiffs or defendant, plaintiffs were entitled to compensation at the rate of one dollar per acre, if the land sold had been previously listed by defendant; otherwise, to one-half the commissions received on the sale. Judgment 19 S. D. 525, 104 N. W. 247 reversed on error. *Dickinson v. Hahn* (S. D. Sup. '09) 119 N. W. 1034.

Sec. 1115. Construction of broker's contract for commissions.

Defendants, who had platted a subdivision, contracted with plaintiff for the sale of the lots, giving him the exclusive right of sale for six months. Plaintiff was to exercise reasonable diligence to sell the property within the time specified. Defendants were to receive the proceeds until they amounted to \$2,300, after which the proceeds were to be divided with plaintiff as compensation for his services; and if there should be any unsold lots, after defendants had received \$2,300, an undivided quarter interest was to be conveyed to plaintiff. *Held*, that the provision requiring the defendants to convey a part of the unsold lots, being only a part of the consideration, was independent of the provision requiring the plaintiff to exercise reasonable diligence to sell all the lots, and upon selling \$2,300 worth of lots, he was entitled to the share of the proceeds of subsequent sales within the contract period, and also to a conveyance of a one-fourth interest in the unsold lots. *Mitchell v. Rushing* (Tex. Civ. App. '09), 118 S. W. 582.

Sec. 1116. Contract held to be divisible and not entire.

A contract with a broker, after providing the amount of the commissions to be paid on sales as made, recited that the commissions were "to become due on one-quarter payment of the selling price of any piece of land sold." *Held*, That the contract was apportionable, and not entire, contemplating that whenever a payment was made amounting to 25 per cent. or more of the selling price of a tract of land sold, the commission on the sale became due and payable. *Tilton v. James L. Gates Land Co.* (Wis. Sup. '09), 121 N. W. 331.

Sec 1117. Construction defining the word "list" in contracts with brokers for the sale of real estate.

A contract by a real estate broker to "list" real estate, is not satisfied by merely taking a description of the real estate by the broker, but the most restricted construction of the word "list" would at least require that some mention of the real estate should appear in some of the broker's pamphlets advertising the property for sale, and, in the absence of such listing, the broker could not recover commissions provided in case of withdrawal

of the land by the owner. *F. A. Strout Co. v. Gay* (Me. Sup. '09), 72 A. 881.

Sec. 1118. Construction of contract to pay commissions to broker.

In an action for commissions on a contract by which plaintiff was employed to sell lots at private sale or public auction, "collect all first moneys," and do certain other things, the question was whether plaintiff was entitled to commissions on defaulting contracts of sale, and the case was submitted on an agreed statement reciting the amount of commissions accruing "on defaulted contracts of sale with purchasers at the auction sale * * * and no part of which has been or will be received," and that plaintiff claims right to the commissions, "regardless of subsequent defaults of contracting parties." *Held*, that there was nothing to show that as to sales in which default was made, there was any "first money" to be paid, in the absence of provision for which the auction sale was, under the Civil Code, Secs. 1793, 1798, complete when the auctioneer announced the lots were sold, and entered minutes of the sale in his sale-book, and nothing to show that if there was provision for "first money," it was not collected by plaintiff, the recited failure of receipts being capable of being referred solely to subsequent default payments, and that no presumption as to the existence of such a provision, or as to the failure of plaintiff to collect "first money," if there was a provision therefor, could be made, so as to defeat plaintiff's right of recovery in the absence thereof; the contract not making it a guarantor of payments of the purchase price on sales made by it. *Benedict v. Wilson* (Cal. App. '09), 103 P. 350.

Sec. 1119. Construction of contract.

F. & J. were agents for H. for the sale of real estate. H. had sold certain lands to G. F. acting as agent for G. sold his lots to plaintiff, who paid down \$200. The contract provided that it was made subject to the owner's acceptance. An incumbrance upon the title was discovered, and a demand for its removal was refused. The contract was then presented to G. for approval, and upon his refusal to approve, a demand was

made for the return of the down payment, which was also refused. Plaintiff alleged that H. was the owner of the lot, and that F. in making the sale and receiving the money acted for H. *Held*, That the fact that F. was the agent of H. for the sale of the lots, is not evidence that he was acting other than as agent for G. in negotiating the sale to plaintiff, since F. had no connection with J., each maintaining separate relations with H.; that the payment to F. was not a payment to either H. or J., neither of whom had any connection with the sale to plaintiff, and there can be no recovery except from F. or his principal G. *Jones v. Jones* (Wash. Sup. '09), 104 P. 786

Sec. 1120. Construction of contract.

A contract between a land owner and a real estate agent gave the agent the exclusive sale of the land for ten years at such prices as he might deem best, provided that no tract should be sold at less than the value named in the schedule attached. Out of the proceeds of the sales a stipulated amount was to be paid to the owner, and the balance equally divided between the parties to the contract. *Held*, that the agent had the sole right to fix the selling price, provided it was not less than the schedule value, and that the owner could not arbitrarily refuse to approve a sale for the reason that the price was not satisfactory to him. *Young v. Metcalf Land Co.* (N. D. Sup. '09), 122 N. W. 1101.

Sec. 1121. Construction of contract.

A contract for the exchange of property made by plaintiff and a purchaser whom defendants had procured, provided that to bind the contract the purchaser had deposited with defendants a deed executed to plaintiffs, and that plaintiffs had paid to defendants \$500; if the purchaser failed to perfect his title to the tract conveyed by the deed it should pass in accordance therewith in settlement of commissions and liquidated damages. When defendants learned that the purchaser refused to perform they asked plaintiffs if they should send such deed for record where the land was situated; but plaintiffs replied that they would think about it, and after defendants had held the deed two days without receiving instructions, they sent it to plaintiffs,

who did not have it recorded for three months. The purchaser, in the meantime, had sold the tract to one who recorded his deed prior to the recording of plaintiffs' deed. *Held*, That plaintiffs' failure to have the deed recorded in time was through their own fault, and would not prevent defendants from recovering their commissions from plaintiffs for procuring a purchaser. *Lewis v. Mansfield G. & F. Co.* (Tex. C. A. '09), 121 S. W. 585.

Sec. 1122. Construction of contract.

Defendants agreed to procure a purchaser for plaintiffs' property, and procured one with whom plaintiffs executed a written contract, which provided that to bind the contract the purchaser had deposited with defendants a warranty deed to a certain tract, part of the property to be exchanged, and that plaintiffs had paid to them \$500, and, if the title should prove defective upon examination, the sum deposited and the deed should be returned to the respective parties, but if the title proved good and the purchaser failed to perform, his title to the tract mentioned should pass to the plaintiffs according to the deed deposited with defendants, in settlement of commissions and liquidated damages, and if plaintiffs failed to perform, the \$500 should be forfeited in payment of commissions and liquidated damages, and if both parties failed to perform, the purchaser authorized plaintiffs to convey to defendants the tract above mentioned to secure to them the payment of the \$500 as commissions, and that such sum should be forfeited to defendants as commissions and liquidated damages. *Held*, that, even if defendants were bound by the contract between plaintiffs and the purchaser, it did not make their commissions depend upon the consummation of the exchange, but upon the approval of the titles of the properties; nor did it require defendants to look to the purchaser for their commissions if he breached his contract with plaintiffs, they being bound to pay the commissions in such case, as the purchaser's title to the contract mentioned passed to the plaintiffs in accordance with the deed deposited with defendants. *Id.*

Sec. 1123. Definition in broker's contract of the word "amount."

Plaintiff, a broker, wrote defendant asking what he would take for his land, including the stock and a five per cent. commission. Defendant replied that "\$22,500, your commission \$1,112.50; this amount will buy the place." *Held*, that the word "amount" referred to the total of the two sums mentioned by defendant; the word being defined by Webster as "the sum total of two or more particular sums or quantities, as the amount of 7 and 9 is 16." *Smith v. Fears* (Tex. C. A. '09), 122 S. W. 433.

Sec. 1124. Interpretation of broker's authority to sell a plantation.

Plaintiff sues defendant for commissions alleged to be due him as selling agent of a certain plantation. Defendant resists, on the ground that the sending forward by himself of a power of attorney to plaintiff was a mere "offer" of an agency, and that before it was accepted he withdrew his lands from the market; that in the power of attorney sent forward it was agreed and understood that no sale could or should be made until after the prospective buyer had a conference with him and had satisfied him as to his financial ability, and that he himself should be present at the sale to receive the cash and notes; that when the prospective purchaser in this instance (with whom plaintiff as agent had entered into a written promise of sale of the land), presented himself at Natchez, he did not put him (defendant) in default for non-execution of the promise: *Held*, the defenses urged are not well founded. The sending forward of the power of attorney was not the initial step in the matter of agency. It was in fact accepted by plaintiff's offer to take the agency. If an acceptance was necessary it was accepted by letter and by action within the time that the situation of the parties and the nature of the contract showed it was the intention of the defendant to allow. The notice of the withdrawal of the land from market was a recognition of the pre-existing agency of the plaintiff. This withdrawal was after the plaintiff and the prospective buyer had started to meet defendant at Natchez, and there was no necessity for putting the defendant in default; he had himself put an end to the agency, and had placed it out

of his power to carry out the promise of sale; he had withdrawn from the prospective purchaser an opportunity to show his good faith and ability to purchase. *Lucket Land & E. Co. v. Brown*, 118 La. 943, 43 S. 628.

Sec. 1125. Law requiring contract employing broker to sell land to be in writing not retroactive.

Laws 1905, p. 110, c. 58, requiring a contract for payment of commissions to a broker for the sale of land to be in writing, is not retroactive. *Dean v. Williams* (Wash. Sup. '10), 106 P. 130.

Sec. 1126. Construction of term "title satisfactory to purchaser."

Where a contract for the sale of land calls for a title satisfactory to the purchaser, he has no arbitrary right to refuse the title offered, but it means that the vendor must furnish a good, marketable title. *Id.*

Sec. 1127. Construction of broker's contract and defining the word "timber."

Where a broker's contract employed him to purchase timber options for a percentage of the net profits from the sale of the timber, and certain land was purchased in order to obtain the timber thereon, the word "timber" in the contract of employment could not be extended to include the land, so as to entitle the broker to a percentage of the net profits of the sale of the land, as well as the timber. *Wilson v. James* (Wash. Sup. '10), 106 P. 618.

Sec. 1128. When law of place of performance governs in interpretation of contract.

The place where a contract is made governs, as a general rule, the performance of its terms; but when it is the express intention of the parties that the contract is to be performed at a different place, and under a different jurisdiction from the place where it is made, the law of the place of performance governs. *Benedict v. Dakin* (Ill. Sup. '00) 90 N. E. 712

Sec. 1129. Law of place of performance of contract governs as to compensation.

Where a contract employing a broker to procure a purchaser of real estate in Louisiana did not fix the compensation, but it appeared that the contract was made in Louisiana, without anything to indicate that the parties contemplated a performance elsewhere, and the sale was consummated there, the law of Louisiana governs as to the amount of the compensation, which must be determined by the customary commissions paid for like services in that State. *Benedict v. Dakin* (Ill. Sup. '09), 90 N. E. 712.

Sec. 1130. Definition of term "pecuniarily able" in broker's contract of employment.

The term "pecuniarily able," used with reference to the financial condition of the proposed purchaser procured by an agent of the vendor, does not mean that such purchaser must necessarily have all the money in his pocketbook or to his credit at the bank, but that he is able to command the necessary money to close the deal, on reasonable notice or within the time limited by the vendor, if a time be limited. *McCabe v. Jones* (Wis. Sup. '10), 124 N. W. 486.

Sec. 1131. When interpretation of contract is for the court, when a question of fact for the jury.

The interpretation of writings is for the court, where they are unambiguous, or where they are ambiguous in their terms and the ambiguity can be resolved by reference to other parts of the writing or uncontroverted circumstances; but where the terms of the writing are ambiguous, and the intention of the parties cannot be ascertained without resorting to extrinsic facts which are controverted or unconceded, intention is a question of fact for the jury. *Big Four R. R. Co. v. Clark* (Mo. App. '09), 123 S. W. 95. See Sec. 906.

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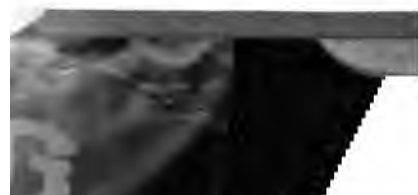
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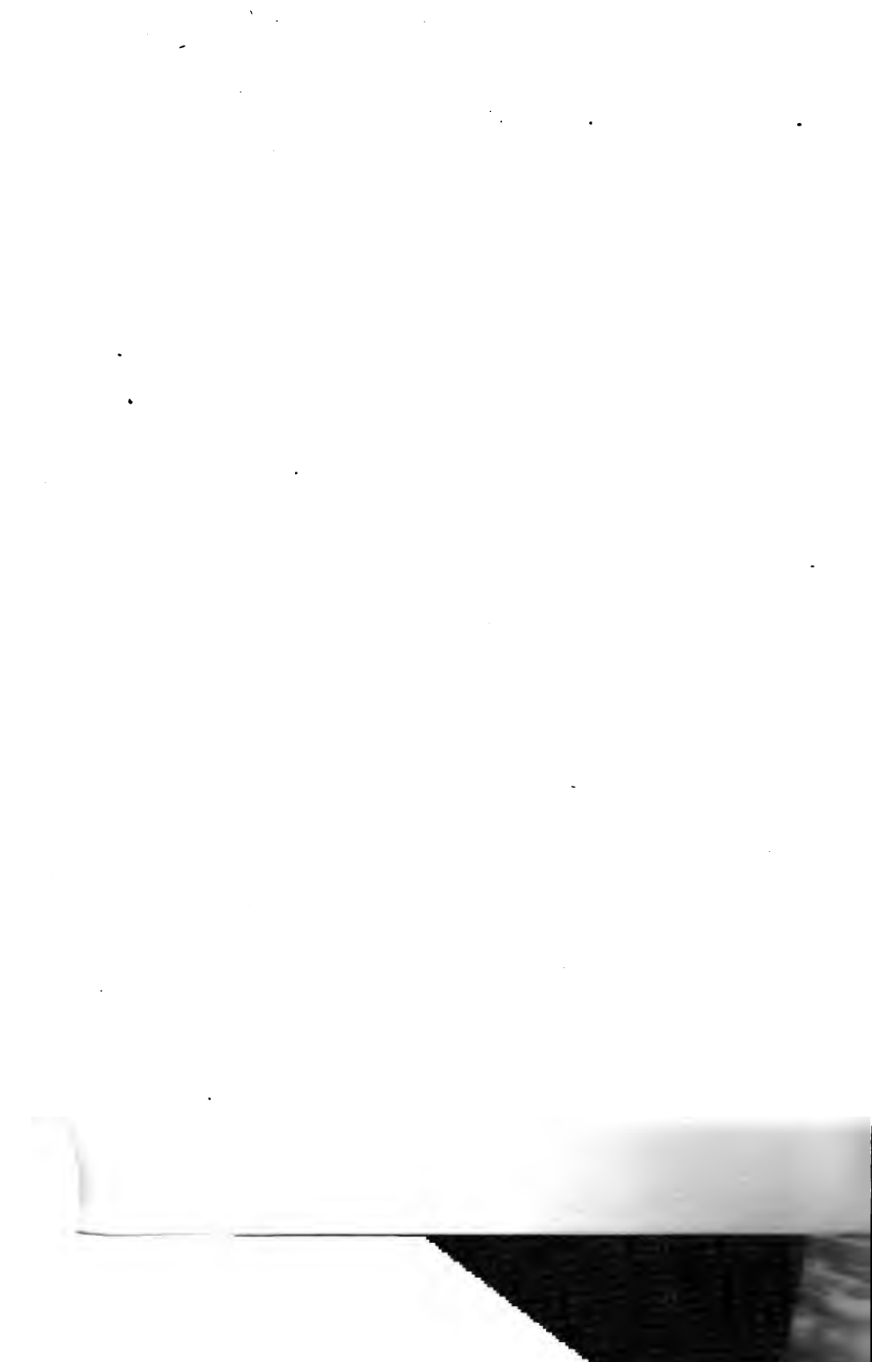
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